Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

KATHLEEN QUICK,

Petitioner,

v.

NATIONAL AUTO CREDIT, INC.
f/k/a AGENCY RENT-A-CAR, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the Eighth Circuit be allowed to contravene and violate the Seventh Amendment to the United States Constitution by reexamining and reversing a jury verdict of actual damages, concluding that there was no fiduciary duty owed when the existence of the duty was admitted at the trial?

2. Should the Eighth Circuit be allowed to reexamine a jury verdict of actual damages (arising from a claim for breach of contractual obligations) when the amount of the actual damage sustained was admitted, undisputed, and uncontested on appeal?

3. Should the Eighth Circuit be allowed to interpret Missouri law in such a fashion that a car rental company providing liability protection to its renters may not be exposed to a claim of consequential damages because of a breach of its contractual obligations provided in the rental contract and thus create disparate treatment between persons who sustain damages due to a breach of contract, thereby denying equal protection?

4. Should the Eighth Circuit be allowed to rule, contrary to Missouri case law and its own precedent, that a claim for the tort of bad faith, arising from a breach of contractual and fiduciary obligations to settle within limits of liability protection available, is not assignable to a judgment creditor?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Kathleen Quick, respectfully requests the Court to issue a Writ of Certiorari in order to review the Opinion of United States Court of Appeals for the Eighth Circuit entered on the 12th day of September, 1995, and the subsequent denial of the petition and suggestion for rehearing entered on the 2nd day of November, 1995.

OPINIONS BELOW

The opinion of United States Court of Appeals for the Eighth Circuit, (App., *infra*, 1), is reported at 65 F.3d 741 (8th Cir. 1995). The judgment entered by the United States District Court on the jury verdict, (App., *infra*, 19), is unreported. A related opinion was issued by the Missouri Court of Appeals and is reported as follows: *Quick v. Wilhite*, 895 S.W.2d 90 (Mo.App. 1995). (App., *infra*, 20).

JURISDICTION

Judgment of the United States District Court for the Western District of Missouri was entered on the jury verdict on the 28th day of September, 1994. The Opinion of the United States Court of Appeals for the Eighth Circuit reversing the trial court's judgment entered on the jury verdict was issued on the 12th day of September, 1995. A petition for rehearing en banc and before the panel was filed with the United States Court of Appeals for the Eighth Circuit on the 26th day of September, 1995. (App., *infra*, 60). The petition for rehearing en banc and

petition for rehearing by the panel was denied by the United States Court of Appeals for the Eighth Circuit on the 2nd day of November, 1995. Jurisdiction of the United States Supreme Court is sought pursuant to Title 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT VII TO THE UNITED STATES CONSTITUTION

Civil Trials

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

AMENDMENT XIV TO THE UNITED STATES CONSTITUTION

Section 1. Citizens of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Missouri Statutes:

§303.160 R.S.Mo., (App., *infra*, 27)

§303.190 R.S.Mo., (App., *infra*, 29)

§303.220 R.S.Mo., (App., *infra*, 28)

STATEMENT OF THE CASE

The United States Court of Appeals for the Eighth Circuit has reversed a judgment entered on a jury verdict for assigned claims of breach of contract and bad faith arising out of fiduciary duties owed by a car rental company to provide defense of a liability suit and to settle within the limits of liability protection available under a car rental contract. The car rental company, Agency Rent-A-Car, Inc. (hereinafter referred to as "Agency"), refused to settle a wrongful death claim by paying the $25,000.00 limit of liability protection available for its renter and failed and refused to defend a suit for wrongful death instituted against its renter after specifically reserving rights to control defense.

Agency admitted during trial that it owed a fiduciary duty to its renter, Kendrick Wilhite (hereinafter referred to as "Wilhite"), to provide defense and effect settlement within the liability protection limits available in order to protect him. Contrary to the testimonial admissions of Agency's representative during trial, the Eighth Circuit Court of Appeals held that there was no fiduciary duty owed by Agency. Utilizing its own factual determination, the Eighth Circuit held that there was no bad faith established.

The Eighth Circuit also reduced the amount of actual damages assessed by the jury verdict, in the amount of $6.5 million with interest, to $25,000.00, although the outstanding judgment against petitioner's assignor, Wilhite, exceeded $6.5 million. Agency admitted during trial that the judgment against Wilhite would not have been obtained had it fulfilled its obligation to provide defense of Wilhite in the wrongful death suit instituted in a Missouri state court.

In July, 1992, Kendrick Wilhite, a student at the University of Nebraska, contracted for the rental of an automobile from Agency. Wilhite traveled to his home in St. Louis, Missouri, to visit his family. On the return trip he was involved in an automobile accident resulting in the death of an 11 year old girl.

The rental contract which Wilhite was required to execute with Agency, (App., *infra*, 38), provided liability protection up to $25,000.00 per person, $50,000.00 per occurrence. Agency is a self-insured company in the State of Missouri and other states and similar to insurance companies, maintains its own in-house claims department, claims manual, claims adjusters and attorneys for the purpose of handling liability claims asserted against renters of its automobiles.

The executed rental contract provided that Agency had the right to control defense of any liability suit instituted against Wilhite as well as the right to determine when and if settlement should be effected. The rental contract also included a penalty provision, typical of many liability insurance contracts, providing that Agency

would not be obligated to pay any settlement obligation assumed independently by the renter.

Kathleen Quick, natural mother of the deceased 11 year old girl, retained an attorney and a claim was asserted against Wilhite. Agency was contacted by attorney for Kathleen Quick and demand was made for payment of the $25,000.00 liability protection limit available to Wilhite under his rental contract in order to resolve the wrongful death claim. Agency notified Wilhite of the claim, the limits of liability protection, and undertook negotiations with the attorneys for Kathleen Quick. Agency failed and refused to settle the claim for the $25,000.00 limit of liability protection available. Agency admitted knowing that Wilhite had no other liability insurance.

The attorneys for Kathleen Quick instituted a wrongful death suit. Copies of suit papers reflecting the institution of suit against Kendrick Wilhite were forwarded to claims representatives for Agency with a cover letter dated March 12, 1993. (App., *infra*, 54).

During a March 30, 1993 telephone discussion between one of Kathleen Quick's attorneys and a claims representative for Agency, Kathleen Quick's attorneys learned that Agency remained unwilling to settle by paying its limits of liability protection in exchange for a liability release from Kathleen Quick in favor of Wilhite. Agency also indicated it was unwilling to interplead its funds available for satisfaction of all injury claims arising from the accident. There were no other serious claims for injuries. Agency was advised that service of process had been obtained upon Wilhite and that it would need to

proceed with making a decision as the time for pleading was running.

On April 5, 1993, an attorney for Kathleen Quick submitted a letter to the claims department of Agency confirming the understanding obtained as a result of the phone conversation of March 30, 1993. The letter also confirmed that previous settlement demand had been made for the liability protection limits and included accusations against Agency that it was acting in "bad faith", exposing its insured to "catastrophic personal liability", "outrageous conduct", and stated that the claim for wrongful death may have a value of several million dollars. (App., *infra*, 57).

Agency's claims department did not take any action to provide defense of Kendrick Wilhite after receipt of the letters from attorneys for Kathleen Quick dated March 12, 1993, and April 5, 1993. No efforts were made to effect settlement. A claims adjuster with Agency made an entry in the company's claims diary on March 19, 1993, wherein he opined that "the accident is of a very serious nature and that the case is an obvious limits case". (App., *infra*, 44).

On April 27, 1993, after presentation of a significant amount of evidence, a default judgment was rendered against Kendrick Wilhite in the Circuit Court of Wright County, Missouri, for $6.5 million with interest at 9% from the date of judgment until paid. (App., *infra*, 36). Agency and its attorneys learned of the default judgment one week after the date of its entry.

Five months later, on September 23, 1993, Wilhite learned of the default judgment and assigned to Kathleen

Quick any claims he might have, whether in contract or in tort, against Agency by reason of its failure or refusal to defend him or settle the wrongful death claim within the limit of liability protection available to him under his rental contract. (App., *infra*, 34).

In November, 1993, Kathleen Quick as assignee of Kendrick Wilhite instituted suit against Agency Rent-A-Car, Inc. in the United States District Court for the Western District of Missouri, Southern Division in Springfield, Missouri. The complaint alleged claims for breach of contract and bad faith. Jurisdiction of the federal district court was premised upon diversity of citizenship pursuant to Title 28 U.S.C. §1332(a).

During the course of the suit in federal court, Agency sought to assert a counterclaim against Kathleen Quick, as well as a third party complaint against her attorneys that had represented her through the time that the default judgment had been obtained on her behalf against Wilhite. The counterclaim ultimately was dismissed by the trial court. Leave to assert a third party complaint against the attorneys was denied.

In March, 1994, while discovery was ongoing in the federal court suit, Agency instituted a separate declaratory judgment action in the Circuit Court for the City of St. Louis, Missouri, naming Wilhite as a defendant, whereby Agency sought to obtain a declaratory judgment that there was no liability protection or coverage obligation due from Agency to Wilhite on the judgment rendered against Wilhite in the Circuit Court of Wright County, Missouri. Kathleen Quick was not a named party

to the state court declaratory judgment suit. The allegations made by Agency in its declaratory judgment suit were the same as a number of its defenses previously asserted in its answer to the complaint filed in federal court.

The Circuit Court for the City of St. Louis, Missouri, refused to grant Wilhite's motion to dismiss the declaratory judgment suit, which was premised on the fact that there was another action previously pending in the United States District Court. Thereafter, Kathleen Quick intervened in the declaratory judgment action asserting that, as assignee of all of Wilhite's claims against Agency, she was an indispensable party. Quick's intervention effected a delay of the trial scheduled on the state court declaratory judgment suit.

A jury trial on the assigned claims for bad faith and breach of contract commenced in federal court on September 26, 1994. The jury returned its verdict on September 28, 1994, for breach of contract and bad faith, awarding actual consequential damages in the amount of $6.5 million with 9% interest from April 27, 1993 (the full amount of the underlying judgment rendered against Wilhite), and assessing punitive damages in the amount of $885,000.00. (App., *infra*, 19).

Agency appealed to the United States Court of Appeals for the Eighth Circuit after the trial court denied post trial motions. The Eighth Circuit Court of Appeals determined that there was no fiduciary duty owed by Agency to Wilhite, although Agency had never asserted during trial, in post trial motions, or on appeal, that it did not owe a fiduciary duty. The Eighth Circuit Court of

Appeals also held, after initially determining that the bad faith claim must fail on the merits due to lack of a fiduciary duty, that the bad faith claim was not properly assigned to Kathleen Quick and was not assignable. The Eighth Circuit held that Wilhite had assigned the claim for breach of contract to Kathleen Quick and that a claim for breach of contract had been established. Without explanation, the Eighth Circuit determined that the amount of actual damages resulting from the breach was $25,000.00, instead of the amount of the adverse judgment rendered against Kendrick Wilhite by reason of the breach, $6.5 million, which was the amount of actual damages determined by the federal court jury verdict.

REASONS FOR GRANTING THE WRIT

The Seventh Amendment to the United States Constitution provides United States citizens a written guaranty from their Government that they will not be deprived by a United States Court the benefit of a fact determination in their favor made by a jury. The Eighth Circuit has deprived petitioner Kathleen Quick of this fundamental guaranty by reversing the judgment entered on a jury verdict, premised upon breach of a fiduciary duty which Agency Rent-A-Car, Inc. admitted that it owed during the jury trial in federal district court.

This Court consistently has upheld the Seventh Amendment limitations prohibiting courts from engaging in fact finding where that function previously was delegated to a jury. *Basham v. Pennsylvania R.R.*, 372 U.S. 699, 10 L. Ed. 2d 80, 83 S. Ct. 965 (1963). Recently this Court

has provided a passing reiteration of the rule in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 114 L. Ed. 2d 660, 111 S. Ct. 2077 (1991). Prior to the instant case, the Eighth Circuit has complied with this constitutional mandate. See, *Green v. American Airlines, Inc.*, 804 F.2d 453 (8th Cir. 1986).

The Eighth Circuit needs a direct reminder of the long standing constitutional obligation to refrain from making its own factual determinations in order to justify its chosen result. This case presents that opportunity.

Agency's Vice President and head of its claims department admitted under oath, during direct examination before the jury, that his company insists upon controlling defense and settlement of claims asserted against their renters. He also admitted under oath, during direct examination before the jury, that his company owes to its renters a fiduciary duty, a duty of trust, because it insists upon controlling defense and settlement. See quoted testimony set forth in Petitioner's Petition And Suggestion For Rehearing En Banc (App., *infra*, 62, 63, 65, 66, 67). It is within the province of the jury to decide whether to believe the testimonial admissions of a witness. In returning a verdict against Agency on the bad faith and breach of contract claims, it is implicit that the jury believed the testimonial admissions of Agency's Vice President and head of the claims department that the company controls the defense and settlement of claims against its renters and therefore owes its renters a fiduciary duty.

Incredibly, the Eighth Circuit has reversed the judgment entered on the jury verdict, based in part on its own fact determination that Agency did not control settlement

or control defense and owed no fiduciary duty to Wilhite. A clearer refutation of the Seventh Amendment and its limits is hard to imagine.

The Eighth Circuit also has unconstitutionally invaded the province of the jury in redetermining actual damages assessed by the jury's verdict. There could have been no award of exemplary damages without existence and award of actual damage. The amount of the actual damage visited upon Wilhite was clear, unequivocal and undisputed, during trial and on appeal. To date, Wilhite owes in excess of $6.5 million, evidenced by a judgment, which he would not owe if Agency had fulfilled its obligations to defend him. Agency admitted this at trial.

The general rule on the measure of damages due to a breach of contractual obligation (in this case, the obligations to defend and settle) has been just as clear as the constitutional prohibition against an appellate court's engaging in independent fact finding after a jury trial. The long standing rule for economic injury is that the damage assessment should be equal to the injury. That is, the injured party is to be made whole. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 45 L. Ed. 2d 280, 95 S. Ct. 2362 (1975). This general and long standing rule has been followed by the Missouri Supreme Court, see *Boten v. Brecklein*, 452 S.W.2d 86 (Mo. 1970), and the Eighth Circuit, see *United Industrial Syndicate, Inc. v. Western Auto Supply Co.*, 686 F.2d 1312 (8th Cir. 1982).

Without explanation, the Eighth Circuit determined that Wilhite's actual damages were only $25,000.00. In this case, the Eighth Circuit has ignored the very fundamental contract principle pertaining to the appropriate

measure of damages. The reduction of these damages from a sum in excess of $6.5 million to $25,000.00 by the stroke of the appellate judicial pen is in conflict with long standing general contract law, and it is evidence of another violation of the Seventh Amendment's restriction on an appellate court's making findings of fact contrary to those previously determined by a jury.

Additionally, the Eighth Circuit arguably has created a separate measure of damages for breach of an obligation to defend and provide liability protection which is completely different from the measure of damages for the breach of any other contract obligation. There is no rational basis, reason, or legal justification for creating such unequal and disparate treatment. The common law and the Fourteenth Amendment to the United States Constitution condemn this result.

The Eighth Circuit, in denying consequential damages caused by a breach of a contract providing liability protection, is now in conflict with the Fifth Circuit (see *Columbia Mut. Ins. Co. v. Fiesta Mart, Inc.*, 987 F.2d 1124, 1127 [1993]); the Ninth Circuit (see *Consolidated Am. Ins. v. Mike Soper Marine Servs.*, 951 F.2d 186, 190 [1991]); the Seventh Circuit (see *Green v. J. C. Penney Auto Ins. Co., Inc.*, 806 F.2d 759, 763 [1986]); the D. C. Circuit (see *Gray v. Grain Dealers Mut. Ins. Co.*, 871 F.2d 1128, 1133 [1989]); the Tenth Circuit (see *Coleman v. Holecek*, 542 F.2d 532 [1976]), prior decisions of the Eighth Circuit and Missouri decisions. All of the above hold to the general proposition that if an insurer fails to settle or defend, it is liable for the damages caused by the breach.

Missouri has adopted this position in the cases of *Landie v. Century Indemnity Company*, 390 S.W.2d 558 (Mo.App. 1965), and *Fuller v. Lloyd*, 714 S.W.2d 698 (Mo.App. 1986). These cases uphold the theory of damage assessments by requiring those who breach a contract providing liability protection to assume responsibility for the consequential damages caused by the breach.

The Eighth Circuit, en banc, cited *Landie* with approval in upholding consequential damages assessed against an insurer in the case of *Luke v. American Family Mutual Insurance Company*, 476 F.2d 1015, 1021 (8th Cir. 1973), stating: *"We find the entire judgment was the natural consequence and proximate result of the defendant's breach of its obligation to defend its insured."* (See also *Carpenter v. Automobile Club Interins. Exch.*, 58 F.3d 1296, 1302 [8th Cir. 1995], holding that an insured could not be whole unless allowed to collect damages equal to the entire amount of the underlying state court judgment from the insurer).

Self-insured car rental companies are required by Missouri statute to pay the same judgments in the same amounts as an insurer would have been obligated to pay under an owner's motor vehicle liability policy. §303.160 R.S.Mo. (App., *infra*, 27). Indeed, self-insured car rental companies, such as Agency, are required to supplement their certificate of self-insurance with an agreement accepting this responsibility. *Id.* By reducing the damages to $25,000.00 in this case, the Eighth Circuit has ignored the requirements of Missouri statutory and case law and consequently has created disparate treatment between those who have liability coverage arising from their own contract of insurance and those who are provided liability coverage by companies who elect to self-insure.

A cause of action or claim for damages is an intangible property interest protected by the Fourteenth Amendment. *Tulsa Collection Servs. v. Pope*, 485 U.S. 478, 99 L. Ed. 2d 565, 108 S. Ct. 1340 (1988). The Eighth Circuit has deprived Kathleen Quick of her valuable claim through a constitutionally prohibited exercise of authority. By making fact determinations contrary to those previously made by a jury, the judges of the Eighth Circuit have deprived Kathleen Quick of a property interest.

Argument to the contrary might be persuasive if the position taken by the Eighth Circuit were even fairly debatable. It is not. There is no reasoned legal analysis which would support the Eighth Circuit's conclusions.

The Eighth Circuit's determination that a claim for bad faith is not assignable comes in the face of existing precedent to the contrary and, indeed, is without any supporting legal authority for the conclusion. For Missouri cases regarding assignability of claims see, e.g., *State ex rel Smith v. Greene*, 494 S.W.2d 55 (Mo. 1973); *State ex rel Park Nat'l Bank v. Globe Indemnity Co.*, 61 S.W.2d 733 (Mo. 1933); *Ganaway v. Shelter Mut. Ins. Co.*, 795 S.W.2d 554 (Mo.App. 1990); *Houston v. Wilhite*, 27 S.W.2d 772 (Mo.App. 1930). Missouri courts have held that claims arising out of breach of contract or fraud are assignable. Breach of fiduciary duty or "bad faith" claims are considered offshoots of fraud claims in Missouri. Bad faith claims such as that in issue in this case arise from the insurer's (Agency's) contractual obligation to defend and/or reasonably settle claims asserted against the insured (renter). Ironically, the Eighth Circuit itself previously has affirmed judgments obtained on assigned claims of bad faith asserted against liability insurers. *Luke*

v. American Family Mut. Ins. Co., 476 F.2d 1015 (8th Cir. 1973). The ruling of the Eighth Circuit in this case clearly is contrary to its own precedent.

Because a party must bring any and all claims arising out of the same transaction or occurrence in one suit, the Eighth Circuit's holding that bad faith claims are not assignable produces an anomalous result: When an insurer fails to perform its contractual duties, exposing the insured (renter) to a judgment in excess of available liability coverage, according to the Eighth Circuit the insured may not assign all of his potentially valuable claims in an effort to protect his personal assets. The decision of the Eighth Circuit effectively implies that a cause for action may be split, i.e., that part of the cause which may be premised upon breach of contract may be assigned to a judgment creditor, whereas a claim for bad faith may not be assigned. This is in spite of the fact that a bad faith theory of recovery arises out of breach of the same voluntary contractual relationship. Further, under long standing precedent, should the insured assign only that part of his cause premised on a breach of contract theory, and should the assigned theory be prosecuted, the insured (renter and judgment debtor) could be barred from asserting any other theory of recovery in a separate suit under principles of res judicata, collateral estoppel and the rule against splitting a cause of action.

If Wilhite's claims arising from Agency's breach of its contractual relationship represented an intangible property interest as this Court held in *Tulsa Collection Servs. v. Pope*, 485 U.S. 478, then certainly the claims or theories of recovery denominated as breach of contract and bad faith

which he sought to assign to Kathleen Quick should have been held to be properly assigned. Missouri case law supports the assignment. Contrary to the opinion of the Eighth Circuit, there is in fact no Missouri case law which indicates otherwise.

The Eighth Circuit's ruling on the merits of the bad faith claim after concluding that the claim was not properly before it or the trial court was improper (this error assumes the correctness of the decision that the bad faith claim was not properly assigned to Kathleen Quick). See, *Singleton v. Wulff*, 428 U.S. 150, 49 L. Ed. 2d 826, 96 S. Ct. 2868 (1976). Further, the Eighth Circuit's finding error and grounds for reversal where no error had been complained of in trial, post-trial motions, or on appeal was beyond the Court's authority. *Singleton v. Wulff*, 428 U.S. 150, *supra*; *Kelley v. Crunk*, 713 F.2d 426 (8th Cir. 1983); *Green v. American Airlines, Inc.*, 804 F.2d 453, *supra*. All of these departures from the usual course of appellate practice deserve this Court's attention, clarification and admonition.

The fiduciary relationship which exists between an insured and an insuror, once a liability claim is asserted, also deserves attention from this Court. Presently, this issue is particularly important because most states now have a mandatory automobile liability insurance law requiring a licensed driver to maintain some type of liability insurance at all times as an incident and prerequisite to the ability to lawfully operate an automobile upon public streets and highways. Thus, automobile liability insurors benefit from a legislatively mandated market for their products and services.

Actions by our courts and judges may result in just as much of a deprivation of constitutional rights as acts of states or private individuals acting with authority of the government. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, *supra*. Deprivation of constitutional rights visited upon individuals by judicial fiat must be corrected by appellate review. The only available appellate review and opportunity for redress of unconstitutional conduct of the Eighth Circuit is before the United States Supreme Court. Otherwise, Kathleen Quick shall be denied her opportunity for redress of an unconstitutional deprivation of rights.

The Eighth Circuit, by its opinion in this case, has gone beyond the standard measure of appellate review. This situation should be remedied. The power to grant or withhold a remedy now lies solely with this Court. It is respectfully suggested that the Petition for Writ of Certiorari should be granted.

CONCLUSION

The blatant deviation from existing law and infringement of the Seventh and Fourteenth Amendments to the United States Constitution beg for the exercise of this Court's power of supervision.

For all the reasons stated, petitioner, Kathleen Quick, requests this Court to grant a Writ of Certiorari to review the decision of United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 94-3989/95-1045

Kathleen Quick, assignee of Kendrick Wilhite, Appellee, v. National Auto Credit, formerly known as Agency Rent-A-Car, Inc., Appellant.	*	Appeals from the United States District Court for the Western District of Missouri.
Missouri Organization of Defense Lawyers, Amicus Curiae.	*	
Enterprise Rent-A-Car, Inc.,[1] Amicus Curiae.	*	

Submitted: May 17, 1995

Filed: September 12, 1995

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[1] The motion of Enterprise Rent-A-Car, Inc., for leave to file an amicus curiae brief is granted.

Before McMILLIAN, BEAM, and HANSEN, Circuit Judges.

BEAM, Circuit Judge.

In July 1992, Kendrick Wilhite was involved in a car accident while driving a vehicle leased to him by Agency Rent-a-Car (Agency). A wrongful death action stemming from the accident was filed against Wilhite. Without an appearance by Wilhite or anyone on his behalf, a default judgment was entered. The wrongful death plaintiffs obtained an assignment of Wilhite's claims against Agency and prosecuted the present action, alleging breach of contract and bad faith refusal to settle. A jury found Agency liable, and the district court denied various post-trial motions. Agency appeals. We affirm in part, reverse in part, and remand with directions.

I. BACKGROUND

In July 1992, Wilhite rented a car from Agency in Lincoln, Nebraska, so that he could drive to his home in St. Louis, Missouri. On the return trip to Lincoln, Wilhite was involved in a car accident in Missouri. Eleven-year-old Anne Quick was killed in the accident. Others were injured in varying degrees.

Anne's mother, Kathleen Quick, retained Cynthia MacPherson to handle the wrongful death claim. One week after the accident, MacPherson contacted Agency and spoke with Steve Ockajick, who worked in Agency's claims department. MacPherson testified that she offered

to accept $25,000 from Agency, the amount of protection afforded by the rental contract.

Two weeks later, Ockajick sent Wilhite a letter informing him that the maximum protection under the rental agreement was $25,000 per person and $50,000 per occurrence. The letter notified Wilhite that portions of the claims might exceed these limits and advised him to contact his insurance carrier and personal legal counsel. Wilhite acknowledges receiving this letter.

Between September 1992 and March 1993, MacPherson and other counsel for Kathleen Quick attempted to negotiate with Agency and settle the claim.[2] When these attempts failed, Quick filed the wrongful death action against Wilhite. On March 23, 1993, Wilhite was served with a summons and petition. Wilhite did not notify Agency of the summons and did nothing on his own.

On March 30, 1993, MacPherson called Ockajick. She informed Ockajick that the wrongful death action had been filed in Wright County, that Wilhite had been served process, and that time was running for an answer to be filed. Ockajick told MacPherson that he had turned the file over to the legal department and that someone would get back to her once the file had been reviewed.

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[2] There is some dispute as to whether Quick's lawyers ever offered to provide Wilhite a release of all claims in return for the $25,000 payment or, if they did, when this occurred. The jury apparently concluded that a settlement for $25,000 would have been possible before default. For the purposes of this appeal, we assume the accuracy of this factual determination.

After speaking to MacPherson, Ockajick called Wilhite and left a message on his answering machine asking Wilhite to return the call. Wilhite testified that he never received the message from Ockajick. He also testified that when his roommates came home before him, they would sometimes erase the messages and sometimes leave them on the tape.

As indicated, no appearance was entered in the wrongful death action. On April 27, 1993, a default judgment was rendered against Wilhite for $6.5 million. Agency learned of the default judgment one week later. Agency then attempted unsuccessfully, to contact Wilhite.

On September 23, 1993, Wilhite and Quick entered into an agreement. Under the terms of the agreement, Wilhite assigned to Quick his claims against Agency. In return, Quick agreed to forbear enforcing the judgment against Wilhite "until and unless all legal and equitable remedies are exhausted against Agency."

In November 1993, Quick, as assignee for Wilhite, filed the present diversity action in federal district court. Quick alleged that Agency had breached its contract with Wilhite by failing to defend him in the wrongful death action and that Agency had acted in bad faith by refusing to settle within the contractual limits prior to the entry of default judgment. Agency filed a declaratory judgment action in state court. Agency asked the district court to stay the trial until the declaratory judgment action was concluded, but the district court refused.

The trial was held in September 1994 and the jury returned a verdict in favor of Quick. The jury awarded Quick $6.5 million in actual damages, plus interest from

the date of the default judgment, and $885,000 in exemplary damages.[3] In addition, the district court enjoined Agency from proceeding with the declaratory judgment action in state court. Agency filed a motion for new trial or, in the alternative, for judgment as a matter of law. The district court denied the motion.

II. DISCUSSION

In Missouri, a breach of the duty to defend sounds in contract, while a breach of the duty to settle sounds in tort.[4] *Ganaway v. Shelter Mut. Ins. Co.*, 795 S.W.2d 554, 556 (Mo. Ct. App.1990); *Landie v. Century Indem. Co.*, 390 S.W.2d 558, 562-63 (Mo. Ct. App. 1965). The district court denied Agency judgment as a matter of law on both the breach of contract and the bad faith claims. We review these denials de novo. *Chicago Title Ins. Co. v. Resolution Trust Corp.*, 53 F.3d 899, 904 (8th Cir. 1995).

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[3] The jury instructions allowed the jury to return a verdict in favor of Quick if the jury found either breach of contract or bad faith. Although the verdict form did not require the jury to indicate the basis of liability, the jury's award of exemplary damages is telling. Missouri law permits exemplary damages in a breach of contract action if the breaching party's conduct amounts to a separate, independent tort, or in other circumstances not relevant here. *Peterson v. Continental Boiler Works, Inc.*, 783 S.W.2d 896, 902-03 (Mo. 1990) (en banc). Because the jury awarded exemplary damages, we assume that the jury rendered its verdict, at least in part, on the basis of the bad faith claim. Our holding in this appeal eliminates exemplary damages as an element of the breach of contract cause of action.

[4] The district court ruled that Missouri law, not Nebraska law, was applicable. Although probably incorrect, neither party has appealed that ruling.

A. Breach of Contract

In its brief, Agency concedes that under the rental contract it had a duty to defend Wilhite up to the limits of the protection provided by the contract. Agency breached this duty by failing to arrange for counsel to enter an appearance for Wilhite in the wrongful death action. Agency contends, however, that the breach of contract claim should not have been submitted to the jury because Wilhite failed to plead or prove that he substantially performed the contract. The contract requires Wilhite to "fully cooperate" with Agency in investigating and defending claims arising from his use of the rental car but does not specifically require him to notify Agency of receipt of summons. Nevertheless, Agency argues that Wilhite violated the cooperation clause by failing to notify Agency of service of process.[5] We disagree.

Well within the time to plead, Agency was informed that a petition had been filed and that Wilhite had been served. Agency could have verified this information with a single phone call to the clerk of court. Under these circumstances, Wilhite's failure to notify Agency did not constitute a violation of the cooperation clause. *See Thompson v. Columbia Mut. Ins. Co.*, 820 S.W.2d 626, 632 (Mo. Ct. App. 1991) (holding that insured did not violate cooperation clause, despite failure to notify of service, when insurer had a copy of the petition within the time to plead). Agency is not entitled to judgment as a matter of

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[5] Agency also argues that Wilhite was uncooperative in failing to appear or take any steps to prevent the default judgment and in failing to assist in setting aside the default judgment. These arguments are without merit.

law on the breach of contract claim. Therefore, Agency is liable for the protection Quick was due under the rental contract – $25,000.

B. Bad Faith

Agency contends that the bad faith claim should not have been submitted to the jury. In support of this contention, Agency presents several arguments related to the substance of the bad faith claim.

Agency first argues that demand by the insured is an essential element of a bad faith claim and that Quick has failed to establish such a demand. Missouri has long recognized the tort of bad faith failure to settle. *See Zumwalt v. Utilities Ins. Co.*, 228 S.W.2d 750, 755 (Mo. 1950). Missouri courts have generally held that a bad faith plaintiff must prove, among other things, that "the insured has demanded that the insurer settle the claim brought against the insured." *See. e.g., Dyer v. General Am. Life Ins. Co.*, 541 S.W.2d 702, 704 (Mo. Ct. App. 1976). Nevertheless, some Missouri opinions have suggested that demand is not required if the insurer has failed to notify the insured of an offer of settlement. *See Ganaway*, 795 S.W.2d at 564 ("[I]f the insured were not advised of the offers of settlement, he could not have demanded that the offer be accepted."); *c.f. State Farm Fire & Cas. Co. v. Metcalf*, 861 S.W.2d 751, 758 (Mo. Ct. App. 1993) (Shrum, J., concurring) (stating that if insurer has thwarted possibility of demand, then insurer should be estopped from arguing lack of demand).

Agency did not notify Wilhite of Quick's offers to settle the claim within the policy limits. In fact, after

Agency had been informed of the pending wrongful death action and before the entry of default judgment, Agency made only one attempt to contact Wilhite, leaving a message on his answering machine and apparently giving up when Wilhite failed to respond. In these circumstances, we are reluctant to find that Quick's claim fails for lack of a demand although that may be the law of Missouri. For the sake of discussion of other issues, we will assume, without deciding, that Wilhite was not required to demand settlement. Agency also argues that it is not an insurance company and, as such, it is not liable for a bad faith failure to settle. On a simplistic level, Agency is partially correct. Agency is a rental car company, not an insurance company, and it has not attempted to comply with the innumerable statutes and regulations governing the business of insurance. Quick would have us hold that, because Agency is a qualified "self-insurer" under Missouri's Motor Vehicle Financial Responsibility Law, Agency is the functional equivalent of an insurance company, and thus a bad faith claim will lie. Such a holding would be contrary to the teachings of the Missouri Supreme Court.

According to Missouri's Motor Vehicle Financial Responsibility Law, a self-insurer must promise to pay the same judgments in the same amounts as an insurer would be obligated to pay. Mo. Rev. Stat. § 303.160.1(4). The Missouri Supreme Court has recognized, however, that a self-insurer does not automatically assume all the rights and duties that would exist under an insurance policy. *American Family Mut. Ins. Co. v. Missouri Power & Light Co.*, 517 S.W.2d 110, 113-14 (Mo. 1974) (en banc). The

Motor Vehicle Financial Responsibility Law assures financial remuneration to injured parties; it obliges owners to protect the public from judgment-proof drivers by ensuring certain minimum payments. *Id.* at 113. Self-insurance is confined to this obligation. *Id.* The self-insurer's guarantee to pay any judgment operates in favor of the state and the injured party, and does not in any sense operate for the benefit of the negligent driver *Id.* at 114. Accordingly, Agency's status as a self-insurer does not transform it into an insurance company with obligations of indemnity to its lessee.

Ultimately, however, Agency's status as a self-insurer or an insurance company is not determinative. A cause of action for bad faith failure to settle is based not on the defendant's status as a liability insurer but, rather, on a particular balance of power. When one party assumes control of the right to settle claims, then that party has the duty to exercise good faith in considering offers to compromise the claim. *Ganaway*, 795 S.W.2d at 556. In other words, an action for bad faith refusal to settle does not lie unless the defendant reserved to itself the exclusive right to accept an offer to compromise a claim and to settle a dispute. *See Zumwalt*, 228 S.W.2d at 753; *Ganaway*, 795 S.W.2d at 557.

Whether such a reservation exists depends on the specific language of the contract at issue. In *Ganaway*, the Missouri Court of Appeals found that the insurer had reserved to itself the right to settle claims. The Ganaway liability insurance contract provided, in part:

> [T]he Company shall defend any suit alleging [covered] bodily injury or property damage and seeking damages which are payable under the

> terms of this policy, even if any of the allegations of the suit are groundless, false, or fraudulent; but the Company may make such investigation or settlement of any claim or suit that it deems expedient. . . .
>
> The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation, or incur any expense other than for such immediate medical or surgical relief to others as shall be imperative at the time of the accident.

795 S.W.2d at 556-57. In contrast, the Agency rental contract language at issue in the present action provides:

> [Agency] will settle or defend as it considers appropriate, any claim or suit seeking damages for bodily injury and/or property damage up to the MINIMUM dollar amount required for any one (1) rental automobile, per occurrence, in accordance with the applicable motor vehicle financial responsibility laws of the state in which this agreement of rental was executed by the parties hereto. In addition to our limits of liability, we will pay all defense costs we incur. Our duty to settle or defend shall end when our limits of liability for this coverage have been exhausted by tendering such limits in any manner, eg. [sic] to excess carrier.

Appellee's App. at 115.

A comparison of these two contract provisions reveals that the latter does not reserve to Agency the exclusive right to settle claims. First, the contract in *Ganaway* required the insurer to consider settling even "groundless, false, or fraudulent" claims, but the rental contract does not require Agency to do the same. Second,

the *Ganaway* contract gave the insurer the power to settle any claim, while the rental contract gives Agency the power to settle claims only up to the specified limits. Third, and most significantly, the rental contract does not prevent the renter or the renter's liability insurance carrier from negotiating a settlement, and does not penalize the renter or the carrier for doing so. As such, Agency lacks the total control over the settlement process which would be necessary to impose upon Agency the duty to settle in good faith.

Because Agency did not have the exclusive right to settle claims arising from Wilhite's use of its rental car, Agency did not have a fiduciary duty to give good faith consideration to offers to settle. Agency could not have breached a fiduciary duty it did not have.

In addition to its substantive arguments, Agency argues that a bad faith claim is not assignable. In Missouri, the general rule is that causes of action are assignable if they survive to the personal representative. *Beall v. Farmers, Exch. Bank*, 76 S.W.2d 1098, 1099 (Mo. 1934); *Property Exch. & Sales, Inc. v. Bozarth* 778 S.W.2d 1, 2 n.1 (Mo. Ct. App. 1989). An exception to this general rule exists. Although personal injury actions survive, *see* Mo. Rev. Stat. § 537.020, they are not assignable, *Beall*, 76 S.W.2d at 1099; *Bozarth*, 778 S.W.2d at 2 n.1; *Forsthove v. Hardware Dealers Mut. Fire Ins. Co.*, 416 S.W.2d 208, 217 (Mo. Ct. App. 1967). *See also Eastern Atl. Transp. & Mech. Eng'g, Inc. v. Dingman*, 727 S.W.2d 418, 423 (Mo. Ct. App. 1987) (holding that a tort claim is assignable to the extent that it provides the basis for an award of exemplary damages in an otherwise assignable action for breach of

contract). Under this scheme, Wilhite's bad faith cause of action is not assignable.

However, this result is cast into doubt by *Ganaway*. In *Ganaway*, the Missouri Court of Appeals upheld a bankruptcy trustee's assignment of the debtor's bad faith claim. The court reasoned that, under the 1978 Bankruptcy Act, all legal and equitable interests of the debtor, including causes of action, became a part of the bankruptcy estate. The court then stated that "the general law" allows a bad faith claim to be assigned to a judgment creditor either by the insured or by a bankruptcy trustee. 795 S.W.2d at 565 (citing only Annotation, *Assignability of Insured's Right to Recover over Against Liability Insurer for Rejection of Settlement Offer*, 12 A.L.R 3d 1158 (1967)).

The conflict between *Ganaway* and the other Missouri precedent is clear: under *Ganaway*, Wilhite's claim is assignable, while under the other cases, it is not. We think, however, that *Ganaway* runs upstream from clearly established Missouri law. *See Forsthove*, 416 S.W.2d at 217. *Ganaway* is further distinguishable because it involves an often stated exception to nonassignability, statutory authorization (through the bankruptcy act). *See Forsthove*, 416 S.W.2d 216 (unless otherwise provided by statute, claim for damages for personal tort is, at law, nonassignable). Accordingly, we hold that Wilhite's bad faith cause was nonassignable. Thus, Agency is entitled to judgment as a matter of law on this claim.

C. Other

In its brief, Agency has presented a number of additional arguments addressing, among other things, certain evidentiary rulings and jury instructions. Having carefully considered all of the arguments and issues, we find that those arguments not mooted by the foregoing discussion are without merit.

III. CONCLUSION

The district court denied Agency judgment as a matter of law on both claims. We conclude that Agency is not entitled to judgment as a matter of law on the breach of contract claim, but is so entitled on the bad faith claim. Accordingly, the judgment of the district court is affirmed in part and reversed in part. The cause is remanded with directions to enter judgment in the amount of $25,000 plus interest as provided by law in favor of Quick.

McMILLIAN, Circuit Judge, specially concurring.

I concur in the panel opinion on the breach of the duty to defend and the nonassignability of the bad faith refusal to settle issues. I write separately, however, because I do not agree that Agency as a certified self-insurer has no duty to settle. I do not think the Missouri legislature intended self-insurers to escape certain liabilities, such as for breach of the duty to settle, that would attach to third-party insurers.

As noted by the panel opinion, slip op. at 7, Agency is a car rental company, not an insurance company. It is a self-insurer under Missouri law. For the reasons discussed below, I think a self-insurer is much closer to an

insurance company than does the panel opinion, particularly with respect to the duty to settle.

First, I would construe the rental contract to reserve to Agency a sufficient degree of control of the right to settle claims, although admittedly not an expressly exclusive right, especially when considered in light of the other provisions of the rental contract as well as Agency's actions under the rental contract. As noted by the panel opinion, *id.* at 8-9, the rental contract in the present case does not use language as restrictive as that in *Ganaway v. Shelter Mutual Insurance Co.*, 795 S.W.2d 554, 556 (Mo. Ct. App. 1990) (*Ganaway*), much less as restrictive as that in *Zumwalt v. Utilities Insurance Co.*, 360 Mo. 362, 228 S.W.2d 750, 752 (1950). Nonetheless, the rental contract does provide that "Agency will settle or defend, as it considers appropriate, any claim or suit seeking damages" and does not qualify or condition settlement or defense upon any notification or consultation with the lessee (the car rental customer). As noted by the panel opinion, slip op. at 9, the rental agreement does not expressly prohibit the customer, or the customer's insurer, from negotiating a settlement. The rental contract does not contain a provision like that in *Ganaway* explicitly barring the insured, except at his or her own cost, from voluntarily making any payment, assuming any obligation or incurring any expense there than for immediate medical expenses. 795 S.W.2d at 557. The rental contract does, however, provide that its indemnification and hold harmless agreement "shall not apply . . . to any obligation assumed by the Customer or driver under any contract of whatever nature," a condition which arguably would penalize the

customer, or the customer's insurer, from negotiating a settlement, without the approval of Agency.

Other provisions of the rental contract support an insurance relationship. The rental contract includes an indemnification agreement under which Agency agrees to protect the customer against claims for damages for bodily injury or property damage, up to the minimum dollar amount required for one rental automobile per occurrence, as required by the applicable motor vehicle financial responsibility law. The rental contract also requires customers to notify Agency of any accidents occurring while they operate the rental vehicles and to cooperate with Agency, its agents or employees in the investigation, defense or prosecution of any claim or legal proceeding arising out of the operation or use of the rental vehicle. Agency investigates claims made by injured persons against its customers and employs claims adjusters and attorneys to investigate and resolve those claims.

Here, Agency has conceded that under the rental contract it had a duty to defend its customers, up to the limits of its liability. Agency's claims adjuster investigated the accident, negotiated with plaintiff's representatives about a possible settlement, and consulted Agency's legal department about the settlement. In addition, during the litigation of the present case, Agency advanced defenses typical of insurers, such as failure to notify and failure to cooperate, as well as failure to make a demand for settlement.

Next, as noted by the panel opinion, under Missouri law, self-insurers do not automatically assume all the

rights and duties that would exist under an insurance policy. Slip op. at 7, *citing American Family Mutual Insurance Co. v. Missouri Power & Light Co.*, 517 S.W.2d 110, 113-14 (Mo. 1974) (banc) (*Missouri Power*). I have no quarrel with *Missouri Power* under the facts of that case. I would not, however, read *Missouri Power* to permit a self-insured to escape liability under the facts of the present case.

In *Missouri Power* an employee had an accident while driving a company car, with the employer's permission, on personal business. The employer was a self-insurer. The Missouri Supreme Court held that the employer's statutory obligation, as a self-insurer, to pay the same judgments and in the same amounts that an insurer would have been obligated to pay under an owner's motor vehicle liability policy if it had issued such a policy to said self-insurer, did not constitute "other valid and collectible insurance" within the meaning of the employee's liability policy. *Id.*, *citing Home Indemnity Co. v. Humble Oil & Refining Co.*, 314 S.W.2d 861, 865-66 (Tex. Ct. Civ. App. 1958) (*Humble Oil*) The majority opinion in *Missouri Power* emphasized the employee-employer relationship, the employer's lack of liability at common law for an accident involving an employee that occurred outside the scope of employment, the employee's primary liability at common law for his negligent driving, and the inability of the employee, and the employee's insurer, to recoup damages paid for the employee's negligence from the employer. 517 S.W.2d at 113-14, *citing Humble Oil*, 314 S.W.2d at 865-66. The dissenting opinion criticized what it characterized as the majority opinions unsuccessful "attempt to mix apples and oranges – the general rule as

to indemnity in a respondeat superior situation with liability of an insurer under the standard omnibus clause." 517 S.W.2d at 114 (Seiler, J., dissenting); *see Hillegass v. Landwehr*, 176 Wis. 2d 76, 499 N.W.2d 652 (1993) (*Hillegass*) (employee-employer context; holding self-insurer provided "insurance" within meaning of other insurance clause in liability policy).

I believe the dissenting opinion in *Missouri Power* has the better argument.[1] Accepting the analysis of the majority opinion, however, I would distinguish *Missouri Power* from the present case on its facts, that is, the absence of the employee-employer relationship emphasized by the majority opinion in *Missouri Power*. In the customer-car rental agency context, concerns about the doctrine of respondeat superior and employer liability for an employee's personal business outside the scope of employment are irrelevant. Despite Agency's disclaimer that it is not an insurance company, the rental contract and Agency's actions establish that Agency functions substantially like an insurance company, at least with respect to indemnification and settlement of claims against its customers. It is irrelevant to the customer

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[1] The Missouri motor vehicle financial responsibility statute defines "motor vehicle liability policy" to include the usual omnibus coverage found in the standard automobile liability policy whereby the insurer covers the named insured and also any other person using any of the specified motor vehicles with the permission of the named insured. Mo. Stat. Rev. § 303.190 (1994). The statute also provides that the self-insurer will pay the same judgments and amounts that an insurer would have been obligated to pay under an owner's motor vehicle liability policy had it issued one to the self-insurer. *Id.* § 303.160.1(4).

whether the car rental agency is self-insured or obtains insurance from a third-party. *See Missouri Power*, 517 S.W.2d at 114-17 (Seiler, J., dissenting); *Hillegass*, 176 Wis. 2d at 82-86, 499 N.W.2d at 655-56 (same); *see also Gavaghan v. Replacement Rent-A-Car. Inc.*, 811 F. Supp. 1077, 1081 (E.D. Pa. 1992) (Pennsylvania law; rental car customer); *Nathanson v. Hertz Corp.*, 183 Cal. App. 3d 78, 84, 227 Cal. Rptr. 799, 803 (1986) (California law; rental car customer); *Chambers v. Agency Rent-A-Car, Inc.*, 878 P.2d 1164, 1165-67 & n.4 (Utah Ct. App. § 994) (Utah law; rental car customer).

> [T]he legislative decision to permit companies to select the manner in which they are to be "insured" or financially responsible for liability to others should not be confused with [the self-insurer's] contention that self-insured companies be permitted to avoid the obligations and duties that arise from operating motor vehicles [within the state]. Insofar as [the self-insurer] operates motor vehicles within the state . . . , it is subject to the risks and liabilities attending that operation – whether it self-retains the risk or contractually shifts the risk to a third-party.

Hillegass, 176 Wis. 2d at 83, 499 N.W.2d at 655.

The cases cited involved liability claims, not claims for bad faith refusal to settle. Nonetheless, I think a self-insurer should be required to pay both liability claims and any claims related to its mishandling of those liability claims to the same extent as would a third-party insurer.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

JUDGMENT IN A CIVIL CASE

KATHLEEN QUICK, an individual, assignee of Kendrick Wilhite vs. AGENCY RENT-A-CAR, INC.	Case No. 93-3455-CV-S-4 (Filed Sept. 28, 1994)

xxx **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

___ **Decision by Court.** This action came to trial/hearing/a determination before the Court. The issues have been tried/heard/determined and a decision has been rendered.

IT IS ORDERED AND ADJUDGED on the claim of plaintiff, Kathleen Quick, against defendant, Agency Rent-A-Car, Inc., judgment is entered in favor of plaintiff, Kathleen Quick. The damages of plaintiff Kathleen Quick are as follows: actual damages of $6,500,000.00, together with interest thereon at the rate of 9% per annum from April 27, 1993, and exemplary damages of $885,000.00.

September 28, 1994 Date	R. F. CONNOR Clerk
Entered on: September 28, 1994	/s/ Janis J. McBurney (By) Deputy Clerk

Kathleen QUICK, Plaintiff-Respondent,

v.

Kendrick Carmel WILHITE, Defendant,

and

Agency Rent-A-Car, Inc.,
Intervenor-Appellant.

No. 19524.

Missouri Court of Appeals,
Southern District,
Division Two.

Jan 18, 1995.

Motion for Rehearing and/or Transfer to Supreme Court Denied Feb. 21, 1995.

Application to Transfer Denied
April 25, 1995.

Self-insured car rental company sought to intervene in suit arising from accident involving rented car. The Circuit Court, Wright County, John G. Moody, Associate Judge, denied motion to intervene, and rental company appealed. The Court of Appeals, Prewitt, J., held that rental company lacked direct interest that would entitle it to intervene.

Affirmed.

Kenneth A. Slavens and James B. James, St. Louis, for intervenor-appellant.

Thomas W. Millington, James W. Newberry, Springfield, for plaintiff-respondent.

PREWITT, Judge.

On April 27, 1993, plaintiff obtained a default judgment against defendant for 6.5 million dollars. Plaintiff's claims arose from an automobile collision in which defendant was operating a vehicle he rented from appellant. On March 24, 1995, appellant sought to intervene in the matter, alleging that it "is a self-insurer under the laws of the states of the States of Missouri and Nebraska and would be called upon for indemnification of any judgments against Kendrick Carmel Wilhite for actions arising from his operation of the . . . vehicle". The trial court denied the motion to intervene.

Appellant appeals, contending that it could intervene as a matter of right under Rule 52.12(a). Appellant states in its first point that it "had an interest relating to the property or transaction which is the subject matter of the action; the disposition of the action as a practical matter impaired and impeded agency's ability to protect that interest and; agency's interest was inadequately represented by the existing parties and as a matter of law the trial court should have granted agency's motion to intervene."

As stated in *Whitehead v. Lakeside Hosp. Ass'n*, 844 S.W.2d 475, 479 (Mo.App.1992), Missouri courts have previously determined:

> "The liability of an insurer as potential indemnitor of the judgment debtor does not constitute a direct interest in such a judgment so as to implicate intervention as of right in that action. Rule 52.12(a). That is because the insurer does not either 'gain or lose from the direct operation of that judgment.' *State ex rel. Farmers Mut. Auto*

> *Ins. Co. v. Weber*, 364 Mo. 1159, 273 S.W.2d [318,] at 321[4]. An insurer does not have an interest that implicates the rule until the insurer is called upon to make indemnity as to the judgment. It is when a claim for potential indemnity becomes a demand for actual indemnity that the direct interest [right] of the insurer to intervene in the other action accrues. That 'interest' is 'only, and nothing more than, the right to some day in some proper forum and cause litigate its liability upon its above policy.' 364 Mo. 1159, 273 S.W.2d at 322."[1]

Appellant relies extensively upon the *Frost* cases cited in note 2 below. However, those cases both involved uninsured motorist coverage and not liability coverage. The right to intervene, in uninsured motorist cases is necessarily different. *See Oates v. Safeco Ins. Co.*, 583 S.W.2d 713, 719 (Mo. banc 1979). *See also State ex rel. State Farm Mut. Automobile Ins. Co. v. Craig*, 364 S.W.2d 343, 346-349 (*Weber*, upon whom *Whitehead* primarily relies distinguished in uninsured motorist case).

In this case appellant's position is essentially that of a liability insurance carrier. *See Gage & Tucker v. Director of Revenue*, 769 S.W.2d 119, 122-123 (Mo. banc 1989). We conclude *Whitehead* and the cases therein discussed control. The trial court correctly denied appellant's motion to intervene.

With its motion to intervene appellant also filed motion to set aside the judgment. Appellant's remaining two points pertain to the trial court's refusal to rule on

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[1] *Eakins v. Burton*, 423 S.W.2d 787 (Mo.1968), has a similar holding which also supports the trial court.

the motion and set aside the judgment. As we determine that the trial court did not err in refusing to allow appellant to intervene, we need not rule those points.[2]

The judgment is affirmed.

PARRISH and CROW, JJ., concur.

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[2] Nor do we determine whether the trial court could deny the motion to intervene because it was not, as respondent contends, timely filed.

NOV 6 1995

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 94-3989/95-1045WMS

Kathleen Quick, etc.,	*	
	*	
Appellee,	*	Order Denying
vs.	*	Petition for
National Auto Credit, etc.,	*	Rehearing and
	*	Suggestion for
Appellant.	*	Rehearing En Banc
	*	
	*	
Missouri Organization of	*	
Defense Lawyers,	*	
	*	
Amicus Curiae.		

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

November 2, 1995

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

AMENDMENT VII

Civil Trials

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

AMENDMENT XIV

Section 1. Citizens of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

303.160. Proof of financial responsibility, how given. – 1. Proof of financial responsibility when required under this chapter with respect to a motor vehicle or with respect to a person who is not the owner of a motor vehicle may be given by filing:

(1) A certificate of insurance as provided in section 303.170 or section 303.180; or

(2) A bond as provided in section 303.230; or

(3) A certificate of deposit of money or securities as provided in section 303.240; or

(4) A certificate of self-insurance, as provided in section 303.220, supplemented by an agreement by the self-insurer that, with respect to accidents occurring while the certificate is in force, he will pay the same judgments and in the same amounts that an insurer would have been obligated to pay under an owner's motor vehicle liability policy if it had issued such a policy to said self-insurer.

2. No motor vehicle shall be or continue to be registered in the name of any person required to file proof of financial responsibility unless such proof shall be furnished for such motor vehicle.

303.220. Certificate of self-insurance – cancelled, when. – 1. Any religious denomination which has more than twenty-five members with motor vehicles and prohibits its members from purchasing insurance, of any form, as being contrary to its religious tenents, may qualify as a self-insurer by obtaining a self-insurance certificate issued by the director as provided in subsection 3 of this section.

2. Any person in whose name more than twenty-five motor vehicles are registered may qualify as a self-insurer by obtaining a certificate of self-insurance issued by the director as provided in subsection 3 of this section.

3. The director may, in his discretion, upon the application of any religious denomination or person described in subsection 1 or 2 of this section, issue a certificate of self-insurance when he is satisfied that such religious denomination or person is possessed and will continue to be possessed of the ability to pay judgments obtained against such religious denomination or person.

4. Upon not less than ten days' notice and a hearing pursuant to such notice, the director may, upon reasonable grounds, cancel a certificate of self-insurance. Failure to pay any judgment within thirty days after such judgment shall have become final shall constitute a reasonable ground for the cancellation of a certificate of self-insurance.

303.190. Motor vehicle liability policy, contents

1. A "**motor vehicle liability policy**" as said term is used in this chapter shall mean an owner's or an operator's policy of liability insurance, certified as provided in section 303.170 or section 303.180 as proof of financial responsibility, and issued, except as otherwise provided in section 303.180 by an insurance carrier duly authorized to transact business in this state, to or for the benefit of the person named therein as insured.

2. Such owner's policy of liability insurance:

(1) Shall designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby to be granted; and

(2) Shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle or motor vehicles within the United States of America or the Dominion of Canada, subject to limits, exclusive of interest and costs, with respect to each such motor vehicle, as follows: twenty-five thousand dollars because of bodily injury to or death of one person in any one accident and subject to said limit for one person, fifty thousand dollars because of bodily injury to or death of two or more persons in any one accident, and ten thousand dollars because of injury to or destruction of property of others in any one accident.

3. Such operator's policy of liability insurance shall insure the person named as insured therein against loss from the liability imposed upon him by law for damages arising out of the use by him of any motor vehicle not owned by him, within the said territorial limits and subject to the same limits of liability as are set forth above with respect to any owner's policy of liability insurance.

4. Such motor vehicle liability policy shall state the name and address of the named insured, the coverage afforded by the policy, the premium charged therefore, the policy period and the limits of liability, and shall contain an agreement or be endorsed that insurance is provided thereunder in accordance with the coverage defined in this chapter as respects bodily injury and death or property damage, or both, and is subject to all the provisions of this chapter.

5. Such motor vehicle liability policy need not insure any liability under any workers' compensation law nor any liability on account of bodily injury to or death of an employee of the insured while engaged in the employment, other than domestic, of the insured, or while engaged in the operation, maintenance or repair of any such motor vehicle nor any liability for damage to property owned by, rented to, in charge of or transported by the insured.

6. Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein:

(1) The liability of the insurance carrier with respect to the insurance required by this chapter shall become absolute whenever injury or damage covered by said

motor vehicle liability policy occurs; said policy may not be canceled or annulled as to such liability by any agreement between the insurance carrier and the insured after the occurrence of the injury or damage; no statement made by the insured or on his behalf and no violation of said policy shall defeat or void said policy;

(2) The satisfaction by the insured of a judgment for such injury or damage shall not be a condition precedent to the right or duty of the insurance carrier to make payment on account of such injury or damage;

(3) The insurance carrier shall have the right to settle any claim covered by the policy, and if such settlement is made in good faith, the amount thereof shall be deductible from the limits of liability specified in subdivision (2) of subsection 2 of this section;

(4) The policy, the written application thereof, if any, and any rider or endorsement which does not conflict with the provisions of this chapter shall constitute the entire contract between the parties.

7. Any policy which grants the coverage required for a motor vehicle liability policy may also grant any lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy and such excess or additional coverage shall not be subject to the provisions of this chapter. With respect to a policy which grants such excess or additional coverage the term "**motor vehicle liability policy**" shall apply only to that part of the coverage which is required by this section.

8. Any motor vehicle liability policy may provide that the insured shall reimburse the insurance carrier for

any payment the insurance carrier would not have been obligated to make under the terms of the policy except for the provisions of this chapter.

9. Any motor vehicle liability policy may provide for the prorating of the insurance thereunder with other valid and collectible insurance.

10. The requirements of a motor vehicle liability policy may be fulfilled by the policies of one or more insurance carriers which policies together meet such requirements.

11. Any binder issued pending the issuance of a motor vehicle liability policy shall be deemed to fulfill the requirement for such a policy.

AGREEMENT TO PAY JUDGMENTS

I, Louis H. Rice, as a self-insurer pursuant to the provisions of Mo. Stat. 303.160.1(4) (1986), hereby agree, with respect to accidents occurring while the certificate of self-insurance is in force, to pay the same judgments and in the same amounts that an insurer would have been obligated to pay under an owner's motor vehicle liability policy if such a policy had been issued to Agency Rent-A-Car, Inc. (self-insured), as required by Mo. Rev. Stat. 303.160.1(4) and 303.220, (1986).

Agency Rent-A-Car, Inc.
Self-Insured Company

/s/ Louis H. Rice
By Louis H. Rice

May 6, 1993
Date

SUBSCRIBED AND SWORN TO BEFORE ME THIS 6TH DAY OF May 1993, TO CERTIFY WHICH, WITNESS BY HAND AND SEAL OF

/s/ CLM
NOTARY PUBLIC

Charles L. Morrow, Esq.
NOTARY PUBLIC, STATE OF OHIO
COMMISSION HAS NO EXP. DATE
R.C. 147.03

ASSIGNMENT

THIS AGREEMENT, dated this 23rd day of September, 1993, by and between Kendrick Carmel Wilhite and Kathleen Quick.

WITNESSETH:

1. Kendrick Carmel Wilhite, hereinafter referred to as assignor, hereby assigns, transfers and delivers to Kathleen Quick, all rights, title and interest in and to any claims or cause of action which he now has or may acquire in the future against Agency Rent-A-Car, Agency Rent-A-Car, Inc., their agents, insurers, assigns, corporate affiliates or any other business name or form under which they have or in the future conduct business as a result of (a) the bad faith conduct of Agency Rent-A-Car, whether arising in contract or tort, in refusing to settle or defend assignor in a claim asserted by Kathleen Quick against assignor for the wrongful death of her daughter, Anne Elizabeth Quick, and in refusing to settle or to defend assignor in a suit styled Kathleen Quick Plaintiff, vs. Kendrick Carmel Wilhite, Defendant, Wright County Case No. CV593-70CC; (b) any act or omission of Agency Rent-A-Car relating to its obligations regarding an automobile accident occurring on or about July 6, 1993, in Platte County, Missouri, in which Anne Elizabeth Quick was killed; or (c) the judgment entered against assignor in Case No. CV593-70CC.

2. In consideration of this assignment Kathleen Quick agrees that neither she nor any person, firm or corporation claiming by or through her will levy execution by attachment or garnishment against any wages, income or property of assignor until and unless all legal

and equitable remedies are exhausted against Agency Rent-A-Car; excluding any federal level appeals which Kathleen Quick elects not to pursue.

/s/ Kendrick C. Wilhite
Kendrick Carmel Wilhite

IN THE CIRCUIT COURT OF
WRIGHT COUNTY, MISSOURI
CIRCUIT DIVISION

KATHLEEN QUICK, Plaintiff, vs. KENDRICK CARMEL WILHITE, Defendant.	)	Case No. CV593-70CC (Filed Apr. 27, 1993)

JUDGEMENT

NOW on this 27th day of April 1993, this case comes on for hearing. The Plaintiff Kathleen Quick appears by counsel, Cynthia O. MacPherson. Defendant Kendrick Carmel Wilhite appears not. An *Interlocutory Order of Default* having been entered in this cause on the 23rd day of April 1993, and no party having requested a jury trial to assess damages, the Court now proceeds with a hearing on the issue of damages.

The Court having found that Defendant Kendrick Carmel Wilhite was served with a valid summons and Plaintiff's *Petition for Wrongful Death* on March 23, 1993, and that said Defendant failed to respond by filing a timely *Answer* to Plaintiff's *Petition for Wrongful Death* as required by Rule 55.25(a) VAMR, was in default. Further, the Court found all allegations in Plaintiff Kathleen Quick's *Petition for Wrongful Death* as taken as true and found in favor of Plaintiff Kathleen Quick and against Defendant Kendrick Carmel Wilhite on all claims asserted by Plaintiff Kathleen Quick and each of them.

The Court after having taken the issue of damages under advisement now proceeds to take up this matter on the issue of damages pursuant to Supreme Court Rule 74.05(b). The Court having heard extensive evidence as to the damages suffered by Plaintiff Kathleen Quick as a result of the death of her only daughter and after considering the extensive evidence and all statutory items of recoverable damages as set forth in §537.090 RSMo, the Court finds that a fair and just award for the death of Anne Elizabeth Quick and the losses thus occasioned to be Six Million Five Hundred Thousand Dollars ($6,500,000).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED based on the pleadings and extensive evidence presented and considered by this Court regarding damages sustained that a *Judgment* for Plaintiff Kathleen Quick and against Defendant Kendrick Carmel Wilhite in the total amount of Six Million Five Hundred Thousand Dollars ($6,500,000) be entered for all statutory damages allowed pursuant to §537.090 RSMo which have been suffered by Plaintiff Kathleen Quick as a result of the death of Anne Elizabeth Quick; that interest on said *Judgment* accrue at the legal rate of Nine Percent (9%) from the date of this *Judgment*.

SO ORDERED this 27th day of April, 1993.

/s/ John Moody
JUDGE JOHN MOODY

[logo]

Deposition Exhibit 15

AGENCY RENT-A-CAR

This agreement is subject to the following terms and conditions:

1. Lessor will settle or defend, as it considers appropriate, any claim or suit seeking damages for bodily injury and or property damage up to the MINIMUM dollar amount required for any one (1) rental automobile, per occurrence, in accordance with the applicable motor vehicle financial responsibility laws of the state in which this agreement of rental was executed by the parties hereto. In addition to our limits of liability, we will pay all defense costs we incur. Our duty to settle or defend shall end when our limits of liability for this coverage have been exhausted by tendering such limits in any manner, eg. to excess carrier. The foregoing indemnification and hold harmless provisions shall be applicable only to losses arising out of the authorized use of the vehicle. Without limitation because of enumeration the aforesaid indemnification and Hold Harmless Agreement shall not apply (a) to any obligation for which the Customer or driver of the vehicle, or the employer of either or any insurance carrier, may be held liable under any workman's compensation or disability benefits law or under any similar law; (b) to any obligation assumed by the Customer or driver under any contract of whatever nature; (c) to any liability of Customer or driver, or employer of either, caused while the vehicle is being used for the transportation of persons or property for hire, expressed or implied. Lessor, as a qualified self-insurer, is not

an insurer and is not extending any insurance coverage to the Customer, either primary or excess, nor uninsured or underinsured coverages unless expressly required by the laws of the state in which this agreement of rental was executed. This coverage may not under any circumstances be stacked with any available other coverages and lessor shall be entitled to any and all set offs from other policies of automobile insurance, med pay policies, hospitalization or medical plans, PIP, worker's compensation benefits, and any other benefits that Customer may recover as a result of accidental injury.

2. Lessor agrees to indemnify and hold harmless Lessee or any additional listed driver and authorized operators only during the term of this Agreement for bodily injury, property damage, uninsured motorists and economic loss coverage up to the minimum mandatory Maryland Insurance requirements for any one (1) rental automobile, per occurrence.

3. LESSEE REPRESENTS AND WARRANTS THAT LESSEE SHALL DEFEND AND HOLD LESSOR HARMLESS FROM AND AGAINST ANY AND ALL LOSSES, LIABILITIES, DAMAGES, INJURIES, CLAIMS, DEMANDS, COSTS AND EXPENSES WHICH EXCEED THE LIMITS OF THE MINIMUM DOLLAR AMOUNT REQUIRED BY THE APPLICABLE MOTOR VEHICLE FINANCIAL RESPONSIBILITY LAWS OF THE STATE IN WHICH THIS AGREEMENT OF RENTAL WAS EXECUTED. LESSEE ALSO REPRESENTS AND WARRANTS THAT LESSEE SHALL SATISFY ALL FINES, PENALTIES, AND FORFEITURES, IMPOSED UNDER ANY FEDERAL, STATE OR MUNICIPAL STATUTE, LAW, ORDINANCE, RULE, REGULATION OR INSURANCE POLICY PROVISION TO THE EXTENT NOT COVERED BY THE INDEMNIFICATION AND

HOLD HARMLESS PROVISIONS OF THIS AGREEMENT OR ANY OTHER APPLICABLE INSURANCE POLICY.

4. LESSEE SHALL REMAIN FULLY RESPONSIBLE FOR ALL DAMAGES TO THE SUBJECT AUTOMOBILE, EVEN IF ROAD HAZARD PROTECTION HAS BEEN PURCHASED, WHERE THE DAMAGE OR LOSS OF USE RESULTS FROM:

   (A) INTENTIONAL, WILLFUL, WANTON OR RECKLESS CONDUCT.

   (B) OPERATION OF THE VEHICLE UNDER THE INFLUENCE OF DRUGS OR ALCOHOL IN VIOLATION OF SECTION 1192 VEHICLE AND TRAFFIC LAWS OF THE STATE OF NEW YORK OR OTHER SIMILAR STATE OR LOCAL LAW.

   (C) TOWING OR PUSHING ANYTHING.

   (D) OPERATION OF THE VEHICLE ON AN UNPAVED ROAD IF THE DAMAGE OR LOSS IS A DIRECT RESULT OF THE ROAD OR DRIVING CONDITIONS.

   (E) DAMAGE OR LOSS INCURRED WHILE THE VEHICLE IS USED FOR COMMERCIAL HIRE.

   (F) USED IN CONNECTION WITH CONDUCT IN VIOLATION OF ANY LAW.

   (G) INVOLVED IN A SPEED TEST OR CONTEST OR IN DRIVING TRAINING ACTIVITY.

   (H) OPERATED BY A PERSON OTHER THAN AN AUTHORIZED DRIVER.

   (I) ANY CUSTOMER WHO PROVIDES FRAUDULENT INFORMATION TO THE LESSOR.

(J) THEFT OR LOSS OF THE VEHICLE WHERE THE CUSTOMER HAS FAILED TO REMOVE KEYS FROM THE SUBJECT AUTOMOBILE.

5. The term "vehicle" shall include all tires, tools, accessories and equipment attached thereto and contained therein.

6. Neither Lessee nor any other driver of the vehicle shall be or is deemed to be the agent, employee or servant of Lessor for any reason or for any purpose.

7. Lessee shall return vehicle to Lessor in the same condition as received to the location where rented unless otherwise designated.

8. Lessor, its agents or employees may without demand and without liability to Lessee or other authorized driver repossess the vehicle if it is used in violation of this agreement.

9. Lessee shall fully cooperate with Lessor, its agents or employees in the investigation, defense and/or prosecution of any claim or legal proceeding arising out of the operation or use of the vehicle.

10. Lessor shall not be responsible for loss or damage to any personal property left or carried in or upon vehicle even if the vehicle is repossessed.

11. This vehicle may not be used for: (a) any commercial purposes; (b) in any race, test or competitive event; (c) to propel or tow any vehicle, trailer or other object; (d) by any person who does not possess a valid drivers license or is under the age of 21.

12. Lessor's prior consent is required for any repair to the vehicle.

13. Written authorization must be obtained before leaving the state in which the vehicle was rented. The

vehicle must be returned to the location where it was rented or a mileage charge will be assessed.

14. Without exception this vehicle may not be driven, operated or used in Mexico.

15. No right of Lessor under this agreement may be waived or modified except by a written instrument signed by the Lessor. The terms of this agreement are cumulative and each of them shall apply to every use, operation or driving of the vehicle.

16. Power of Attorney: Lessee hereby grants and appoints to Lessor a limited Power of Attorney to present Insurance claims for property damage to Customer's insurance carrier if the rented vehicle is damaged during the term of the rental agreement; and to endorse Customer's name on insurance payments, either for damage or for rental charges incurred.

17. Delinquent accounts shall bear interest at the highest rate permissible under the laws of the state where this contract was executed.

18. Implied/Express Warranties: Lessor revokes any and all implied or express warranties as to the merchantability or fitness for a particular purpose of the vehicle or any replacement vehicle rented under the terms of this agreement.

19. The terms and conditions of this contract are subject to any pre-existing authorized agreement by and between Lessor and Lessee, Lessor and Lessee's employer, Lessor's agent and Lessee and Lessor and Lessee's agent. Any terms or conditions contained herein which are not subject to any pre-existing authorized agreement remain in full force, in effect.

20. Lessor will assess a charge of $15.00 for each NSF check.

21. This vehicle must be used in conformity with all criminal, civil and motor vehicle laws, rules and or statutes. Failure to use said vehicle in conformity voids all coverages which may be provided, including, but not limited to, liability and property damage protection.

AGENCY RENT-A-CAR, INC.
CLAIMS DIARY

Excerpt – entry of March 19, 1993

* * *

3/19/93	GAVE THE FILE TO CHUCK MORROW FOR REVIEW AND APPROVAL OF THE CATTY'S PROPOSAL. IT LOOKS GOOD TO ME HOWEVER THERE IS NO DOCUMENTATION FROM ANYONE FOR THE INJURIES. I DO KNOW THAT THE ACCIDENT IS OF A VERY SERIOUS NATURE AND THAT THE CASE IS AN OVVIOUS [sic] LIMITS CASE.	S. OCKAJI

* * *

INFORMATION FOR CLAIMS MANUAL

All file notes should be accessed through collision and comp screen.

Diary should be done either through liability screen or collision and comp screen, not both.

If one or the other is closed (PD/Liability/Subro), access diary through the portion of file that is still open.

Diary CANNOT be placed on a closed file.

FILE ORDER AND TABBING

1) *General* – Includes accident report, police report, contract (all 3 parts), indepedent [sic] adjuster's report (not appraiser's report) R/S and R/S summary sheets, liability set-up sheet and blue sheet.

   NOTE: IMPORTANT!!!!
   The reserve sheet and file notes must be on top of this section NO EXCEPTIONS!!!!

2) Correspondence

3) Claimant Specific – Includes meds, index sheet, authority request sheet.

4) IV Property Damage

5) OV Property Damage

6) Subro correspondence

7) Pleadings (Claimant specific)

File Creation

Every insurance company has their own style of setting up a claim file. The following represents Agency's.

The creation of a file begins in the local office. The Office Manager is responsible for asking the renter specific questions concerning the loss by either phone or in person. At that point, he or she then creates a history sheet which begins the tracking of claim activity.

A representative in the local office provides the renter and/or driver of the Agency car with an Accident Report form. The form should be completed, signed, and returned to the Office Manager as soon as possible. Upon receiving the completed form, the Office Manager calls the Claims Office to report the incident, and thereby obtains a claim number. In addition, the appropriate accident code is inputted into the computer, and if necessary, a liability (blue) sheet will be generated.

The completed liability (blue) sheet is then forwarded to the Unit Supervisor for review and evaluation. Upon completion of the assessment, an adjuster is assigned the liability claim work sheet as well as a set-up sheet, outlining specific investigation instructions to be completed. In addition, the Unit Supervisor will establish the initial claim reserves. When the aforementioned information is completed, it will then be entered into the computer Y [sic] the liability support staff along with the adjuster code.

A physical file will be generated the following morning. It is the adjuster's responsibility to match their initial investigation to the physical file.

Attached find a breakdown of the various accident codes as well as a copy of the liability claim (blue) sheet, and liability set-up sheet.

INVESTIGATION & CLAIM GUIDELINES

Each claim file should be evaluated on its merits. The following items are to be used as an outline guide on each file.

The adjuster should contact the claimant and obtain a recorded statement as needed or pre-instructed regarding the special details of the accident as well as document that injuries were not incurred. Should the claimant be injured, determine the degree of injury, the medical treatment received and any anticipted [sic] treatment which may be needed.

The adjuster should determine if there were any passengers in either vehicle. If yes, determine their name, phone number, individual addresses and if any of the passengers exhibited injury.

If the claimant or passenger(s) are injured, complete an index form and obtain a medical wage authorization per injured person. Recorded statements should be taken of any witnesses regarding the facts of the accident and reactions of all parties involved; physical and emotional.

All files should have a copy of the rental agreement unless it is an employee accident.

The adjuster should determine any contributory or comparative negligence on the claimant's part which may mitigate the claim. Were citations issued? If so, determine to whom and for what offense. The adjuster should check for passengers listed on the police report as well as to determine ownership information.

Accident reports should be sent to passengers in the claimant's and rental vehicle in which a recorded statement has been refused.

The claimant should be requested to obtain two estimates and photos of the damage to their vehicle on PD claims under $1500.00. An independent appraiser should be assigned in the following cases:

1. If the damage is over $1500.00

2. If the vehicle is an older model to verify no old damage.

Should the claimant be unable to obtain a picture, they should be referred to one of our shops for a photo and estimate. The amount of damage to the rental vehicle and location of damage should be checked for comparison. Rember [sic] you cannot insist that a claimant go to our shop for repairs, however, try to encourage this when possible.

First call settlements should be attempted whenever possible. If you have any questions, consult your supervisor.

Should there be attorney involvement, acknowledge receipt of the attorney letter in wirting [sic] by utilizing the word processing letter, #44C. Should the claimant advise legal representation by phone, obtain name, address and phone number of attorney and discontinue contact with claimant. Call attorney, request diagnosis, prognosis, index information, medical authorization, etc., as well as representation letter.

If the claimant is unrepresented and the medical bills are under $1000.00, the claim may be settled without the

actual medical bills. It should be understood, however, that copies of the bills are to be forwarded to us with the executed release. Unless the claim can be concluded within the first 30 to 45 days, copies of all medical records should be requested.

Reserving Practices, Bodily Injury Claims

There are few functions more important than maintaining a proper balance between reserves and the actual payments made on claims. Since we have made the decision to have a $500,000.00 S.I.R. and to effectively monitor the impact of Agency's bodily injury claims on its financial structure, the following reserving practices and procedures are being implemented:

1. As in the past, we will continue to establish individual case reserves and reserve for the ultimate probable exposure.

2. Reserves must be set up promptly. In setting the reserve on each bodily injury claim, the individual reviewing the file must make the best possible estimate of what the claim or suit may ultimately settle for.

3. When it comes to setting the reserve, if there is any doubt concerning the liability, injury or damages, such doubt should be resolved in favor of the claimant. Adjustments can always be made to cover subsequent developments.

The following factors should be given consideration when establishing a reserve:

1. Injury

It is important that you learn the true nature of the injury involved. Very often this will necessitate a medical examination if you have some reasonable doubt about the hospital or the plaintiff's medical report.

2. Pain and Suffering

Long and painful disability always increases the value of a claim. This is the item, which in recent years, has been plaguing the insurance companies and which has been the principal reason for some extremely high verdicts.

3. Possible Punitive Damages

Occasionally damages will be permitted in some jurisdictions where there has been wanton disregard for the safety of others. Punitive damages have also been awarded in cases involving accident, health and lift policies where the judge or jury has decided that the insurance company has been capricious in their refusal to pay the claim. Punitive damages have also been awarded against insurance companies and third party claims where a case was not settled within the policy limits for capricious or fraudulent reasons.

4. Age of Claimant

It is obvious that an older person will suffer a greater disability from a certain injury than a younger person. It has been estimated for instance, that every ten years, over the age of 40 increases disability by

10%. Age is also important in a death claim. The deceased's life expectancy is an important factor in establishing monetary loss to his or her dependents.

5. Dependency

This is an item to be considered particularly in death cases. The claimant may leave a dependent spouse, minor children or other dependents.

6. Loss of Salary

This item speaks for itself. It is essential that the amount and the time lost be checked, preferably from payroll records. In cases of long term disability or death, it is important to consider the salary potential of the individual involved as well as the salary he/she was earning at the time of the accident.

7. Medical Expenses

This is one of the items of special damage, along with loss of salary.

8. Economic Status

This item is not one that can be pinned down to a definite amount, like some of those listed heretofore. However, a claim involving a person in the higher income bracket is usually going to cost more than a similar claim sustained by someone whose losses are not so great.

9. Liability or Negligence

Liability is, of course, one of the most important items to be considered in setting the reserve. Whenever a question of fact

requires the determination of a jury, the odds are against the defendant and this must be kept in mind when setting the reserve.

10. Contributory Negligence on the Part of the Claimant

Again, although this is an item for consideration in the overall reserve set up, any doubt should be resolved in favor of the claimant.

11. Other Legal Defenses

Additional legal defenses such as assumption of risk, agency, fellow servant rule, and so forth, might have a bearing on the ultimate outcome of a claim. These are usually of minor concern when it comes to setting a reserve, but sometimes are so outstanding as to deserve a fair amount of the weight in the overall picture.

12. Past Experience of Tendencies of the Local Juries and Courts

It is a known fact that juries in certain areas are more liberal than they are in others. By the same token, certain judges, being only mortal, have their prejudices and predilections. These when known, should also be given consideration in setting the reserve.

13. Realistic Appraisal of the Ability of Your Own Counsel

This item speaks for itself.

14. Knowledge of the Ability of Opposing Counsel

Here again, the item speaks for itself.

15. Coverage

A paramount consideration of course, in every case. An attempt has been made to highlight some of the considerations which enter into the overall reserve picture on each claim. Naturally, all the items do not apply to every claim, and there are some claims which require consideration of items that have not been listed here. Once again, each case deserves separate consideration, and can only be set up by some general guidelines.

16. Fatalities

Although some of the factors involved in a consideration of the reserve figure for a fatal case have already been mentioned, there are others that apply only to this type of claim. Here are some of the items to which consideration should be given:

* * *

MacPherson Law Center
Attorney at Law

Cynthia O. MacPherson
John J. Garrabrant

Legal Assistants
Jason W. MacPherson
Regina L. Peterson

421 East State
P.O. Drawer 680
Mountain Grove, MO 65711
Telephone (417) 926-3138
Fax (417) 926-3140

March 12, 1993

Mr. Steven B. Ockajik
Claims Examiner
AGENCY RENT-A-CAR
30000 Aurora Road
Solon, OH 44139

RE: My Client : Kathleen Quick
D/Accident : 7/6/92
Your Claim No : 249643-161-L27603

Dear Mr. Ockajik:

Please find enclosed a *Petition for Wrongful Death* which we have filed against your insured, Kendrick Carmel Wilhite. In Missouri, Court approval must be obtained for a wrongful death settlement. I have also enclosed a proposed *Petition for Interpleader and Leave to Pay Fund Into Court*. As you can see by this interpleader motion, you would be requesting the Court to allow you to pay your $50,000 to be held by the Clerk of the Circuit Court and further to bring Kenneth Quick, Sondra Quick, Kendra Quick, Jonathan Quick, Lorenzo Brinkley and Patrick Wilhite into the suit as third-party plaintiffs to

determine their respective interest in that fund. If the parties cannot then agree to a disbursement of the $50,000 amongst the parties injured, then the Court will have to determine the appropriate disbursement of the funds. In any event, you will then be protected from any further liability from competing claims to this limited fund.

I do not believe Attorney Edward Murphy, who represents Kenneth Quick and his family, will have any objection to you paying your funds to the Clerk of the Court in this manner and I can assure you that any local attorney appointed as a guardian for Patrick Wilhite will offer no objection to this manner of proceeding. Therefore, either you or your attorney can merely sign these documents and file them with the Court. Once the *Order* bringing in the Additional Party Plaintiffs and approving the payment of the insurance/bond proceeds has been signed, you could then pay your $50,000 to the Clerk of the Wright County Court located in Hartville, Missouri. You would then be free of further involvement except input as to the releases you would want executed to protect your insured and for the court cost which will probably include the Guardian Ad Litem's fee for Patrick Wilhite.

Please give me a call if you have any questions whatsoever. If I am unavailable, Tom Cline is also working

on this case and will be happy to address any concerns or questions that you may have.

Very truly yours,

/s/ Cynthia O. MacPherson
Cynthia O. MacPherson

COM/ps
xc: Edward Murphy
Kathleen Quick
Tom Cline
Enclosures

MACPHERSON LAW CENTER
Attorney at Law

Cynthia O. MacPherson
John J. Garrabrant

Legal Assistants
Jason W. MacPherson
Regina L. Peterson

421 East State
P.O. Drawer 680
Mountain Grove, MO 65711
Telephone (417) 926-3138
Fax (417) 926-3140

April 5, 1993

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

VIA TELECOPY

Mr. Steven D. Ockajik
Claims Examiner
AGENCY RENT-A-CAR
30000 Aurora Road
Solon, OH 44139

RE: My Client : Kathleen Quick
D/Accident : 7/6/92
Your Claim No : 249643-161-L27603

Dear Mr. Ockajik:

This letter is to confirm in writing that our settlement negotiations in the above-captioned claim have been unsuccessfully concluded. On January 7, 1993, at approximately 3:45 PM CST, Attorney Thomas Cline, who along with myself represents Kathleen Quick, specifically offered you an opportunity to protect your insured, Kendrick Wilhite, by giving him *a Release* from personal liability in this matter upon payment of your policy limits of $25,000. Mr. Cline will testify that you orally agreed to

pay in your per accident limits of $50,000 to not protect your insured, but to protect Agency Rent-A-Car from multiple exposure from competing claims as well. We rightfully assumed the case was settled as to Mrs. Quick's claim for the wrongful death of her daughter Anne.

On March 12, 1993, having been informed by Mr. Cline that the case was settled, I mailed you the necessary paperwork to conclude this settlement. When I did not hear from you after two and one-half weeks, I called on March 30, 1993, to see when we could expect the papers filed and the insurance funds impleaded. I was quite *shocked* when you informed me the case was not settled because we had not yet sent you any *"specials"*. Your rejection of our settlement offer on this ground was beyond belief. It is *your* duty and obligation to investigate the merits and determine the value of a claim in order to protect your insured. Your failure to do so, when given the opportunity, coupled with your further failure to settle within the policy limits on a claim having a worth far in excess of your coverage, is classic bad faith.

It has been over nine months since Anne's death; almost four months since you agreed to settle this claim. Your subsequent rejection of our offer to settle for the $25,000 policy limits and to give your insured a release protecting him from personal liability is outrageous misconduct and will be sufficient to expose Agency Rent-A-Car to an award of punitive damages.

The week after Anne's death, you were informed of our demand for your policy limits of $25,000. You were also informed at the outset of our demand that a $6,500,000 award for the death of an emancipated twenty-

two year old, from whom her wealthy parents expected no future support, was held not to be excessive under Missouri's wrongful death laws. Despite this, for nine months, you have been guilty of nonfeasance and delay. your current position that you don't know what, *if anything*, you owe on this claim, unconscionably exposes your insured to catastrophic personal liability. Agency Rent-A-Car's obvious bad faith toward its insured as well as my client will leave you responsible for the entire *Judgment*.

You have rejected our offer to settle within the limits of your policy; this offer will never again be re-extended to you. You have placed your insured, who has a pro-football career ahead of him, at risk for a large personal *Judgment*, a personal *Judgment* from which you could have protected him had you acted in good faith. It is now our position that you, and not your insured, will be responsible for the *Judgment* we will obtain including those amounts in excess of your coverage.

Very truly yours,

/s/ Cynthia O. MacPherson
Cynthia O. MacPherson

COM/ps
xc: Tom Cline
Kathleen Quick

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Consolidated Nos. 94-3989 and 95-1045

KATHLEEN QUICK, an individual
assignee of Kendrick Wilhite

Plaintiff-Appellee

v.

AGENCY RENT-A-CAR, INC. n/k/a
NATIONAL AUTO CREDIT, INC.

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

PETITION AND SUGGESTION
FOR REHEARING EN BANC

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IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

KATHLEEN QUICK, an individual, assignee of Kendrick Wilhite,	)	
Plaintiff-Appellee,	)	Case Nos.
	)	94-3989
vs.	)	95-1045
NATIONAL AUTO CREDIT, f/k/a AGENCY RENT-A-CAR, INC., a Delaware Corporation,	)	
Defendant-Appellant.	)	

PETITION AND SUGGESTION FOR REHEARING EN BANC

Kathleen Quick, Appellee requests a rehearing en banc to consider the decision, issued in this case because: (I) The Opinion examines issues not briefed by the parties or preserved for appellate review, ignores the jury's factual determinations and admissions of Agency in violation of the Seventh Amendment to the United States Constitution; (II) The Opinion equates a bad faith claim with a claim for personal injury and erroneously determines that a claim for bad faith is not assignable; and (III) the Opinion fails to follow Eighth Circuit and Missouri rulings on the measure of damages in a breach of contract case, and interprets Missouri law in such a manner that imposes disparate treatment of persons damaged by a breach of contract thereby denying equal protection in the application of state law, in violation of the Fourteenth Amendment to the United States Constitution.

Point I

The Opinion Exceeds The Scope Of Review By Reexamining The Jury's Factual determination And Agency's Judicial Admission That A Fiduciary Duty Was Owed To Wilhite, An Issue Which was Not Briefed Or Preserved For Appellate Review

During trial, Agency admitted it owed a fiduciary duty to Wilhite. Agency's Vice President and head of claims, Dennis Ulrich testified that Agency reserved in its rental contract the right to handle the defense of a renter as well as the right to determine when and if any sum of money would be paid in settlement of any suit or claim.

Testimony of Ulrich (Tr. p. 270, L. 8-19):

Q. Now, Mr. Ulrich, you recognize that your company, like some auto liability insurance companies, reserves in its rental contracts the right to handle the defense of a renter if your liability protection is available to protect the renter; isn't that correct?

A. Yes.

Q. And your company also reserves in its rental contract the right to determine when and if any money is going to be paid in settlement of any suit or claim that's pending?

A. Yes. We have to – if there's a conflict, we have to provide separate defense counsel for the renter, as well as counsel for the company.

Mr. Ulrich explicitly admitted the existence of a fiduciary duty contrary to this Court's determination that a fiduciary duty did not exist. The testimony of Mr. Ulrich at Tr. p. 272, L. 3-8, is as follows:

Q. And you do that because you recognize that your company, just like other insurance companies do, that they've got a fiduciary duty to that for their renters?

A. Yes.

Q. It's a duty of trust you owe to them; isn't that right?

A. That's correct.

Agency's judicial admission estops it from asserting before this Court the lack of a fiduciary duty owed Wilhite. In ***Monterey Development v. Lawyer's Title Ins.,*** 4 F.3d 605 (8th Cir. 1993), the Court recognized that judicial estoppel is designed to preserve the dignity of the Courts and insure order in judicial proceedings. See also ***Jockel v. Robinson,*** 484 S.W.2d 227, 231 (Mo. 1972) and ***Beck v. Edison Bros.,*** 657 S.W.2d 326, 329 (Mo.App. 1983) which deal with the binding effect of judicial admissions.

The Opinion's determination that a fiduciary duty did not exist in the face of the clear terms of the rental contract, the admissions of defendant and the facts logically determined by the verdict of the jury, contradicts a long line of decisions of this Court and the Seventh Amendment to the United States Constitution which prohibits a reexamination of issues determined by a jury. The Court in its opinion has exceeded the scope of review as established by the parties during post-trial proceedings. ***Kelley v. Crunk,*** 713 F.2d 426 (8th Cir. 1983); ***Green v. American Airlines, Inc.,*** 804 F.2d 453 (8th Cir. 1986); ***Czajka v. Black,*** 901 F.2d 1484 (8th Cir. 1990). In ***Kelley v. Crunk,*** the Court reiterated the established rule on the scope of the appellate review and stated:

> *It is well settled that issues not raised in the trial court cannot be considered by this court as a basis for reversal.*

The Opinion exceeds the scope of appellate review by examining the issue not disputed at trial or asserted as a basis for appeal. A review of Agency's points presented in their appellant's brief and the twenty-nine pages of argument show that the issue of Agency's fiduciary duty was never appealed. The Seventh Amendment to the United States Constitution prohibits the reexamination of facts tried by a jury other than according to the rules of common law.

In ***Czajka v. Black***, 901 F.2d 1484 (8th Cir. 1990) this Court in considering a motion for a new trial based on the weight of the evidence, stated at page 1485:

> *Appellants have made no effort to address our concerns, expressed in* ***Green v. American Airlines*** *. . . as to whether, in light of the Seventh Amendment, we have the power to reverse a district court's decision to deny a motion for a new trial based on weight of the evidence grounds.*
>
> . . . .
>
> *As we observed in* ***Green,*** *the abuse of discretion standard has been applied in our circuits only to orders granting new trials.*

In accord, see ***Lee v. Rapid City Area District No. 51-4***, 981 F.2d 316 (8th Cir. 1992).

The Opinion concludes on page 9 that Agency lacked the "total control over the settlement proceeds which would be necessary to impose upon Agency the duty to settle in good faith". The issue is not "total control over

settlement" but exclusive control of the money to be paid for settlement of claims. In order to obtain the benefit of the liability protection provided by his contract with Agency, Wilhite was prevented from negotiating a settlement of the underlying wrongful death claim.

Judge McMillian pointed out in his concurring opinion that:

> *The rental contract does, however, provide that its indemnification and hold harmless agreement 'shall not apply . . . to any obligation assumed by the Customer or driver under any contract of whatever nature,' a condition which arguably would penalize the customer, or the customer's insurer, from negotiating a settlement, without the approval of Agency." (at page 12).*

The facts judicially admitted by Agency establish Agency exercised the same level of control over their settlements as other insurors. The contract language and the testimony of Agency's claims supervisor, Mr. Ockajik, (Tr. pp. 186, 212, 215-216) clearly substantiated the control.

Tr. p. 186, L. 10-18:

Q. Okay. Well, you understood – you understand that your rental contract reserves to your company, Agency Rent-A-Car, the right to defend and hire a lawyer for the renter, if necessary?

A. Yes, I do.

Q. And you understand your company reserved the right to determine when and if it was appropriate to settle any claim or lawsuit against your renter?

A. Yes.

Tr. p. 212, L. 9-13

Q. You knew that the only liability protection available for him and the only company out there that had the right, and indeed the duty, to hire a lawyer to defend him was your company, Agency Rent-A-Car?

A. yes.

Tr. p. 215, L. 16-25

Q. And the obligation to consider demands or offers to settle within the policy limits to protect your renter are the same as the obligations to protect an insured under a regular auto liability policy; isn't that right, sir?

A. We have the obligation to protect the renter, yes.

Q. You have the same obligation to consider settlements that are demanded or offered within the limits of your coverage; isn't that correct?

A. Yes, we do.

Q. You reserved to yourself –

Tr. p. 216, L. 1-6

As you've indicated, your company reserves to itself the right to determine when and if to settle and for what amount?

A. That's correct.

Q. And you don't leave that up to the renter?

A. No, we don't.

Testimony of Agency's in-house counsel, Yormick, (Tr. pp. 265-266) Tr. p. 265, L. 25 and p. 266, L. 1-10:

Q. Mr. Yormick, isn't it true that Agency Rent-A-Car owed him protection? They owed him liability protection and a defense and a duty to consider settlement offers or demands within the limits of coverage available; isn't that true, sir?

A. Yes, I think that's been established, and I would agree with that.

Q. And isn't it true that by reason of the lack of a defense being provided on his part, he has a judgment against him for six and a half million dollars today?

A. That's true.

These facts presented to the Jury establish that Agency did possess the type of "control" over settlement which the Opinion determines did not exist. Further, Agency, as a self-insuror, was required to perform in the handling of claims as if it had issued a liability insurance policy. Section 303.190 R.S.Mo. sets forth certain obligations which are deemed, as a matter of law, included in all liability policies and provides in part:

> *"6. Every motor vehicle liability policy shall be subject to the following provisions which need* ***not be contained therein:***
>
> *. . . (3) the insurance carrier* ***shall have the right*** *to settle* ***any claim*** *covered by the policy, and if such settlement is made in good faith, the amount thereof shall be deductible from the limits of liability specified in subdivision (2) of sub-section 2 of this section;" (Emphasis added).*

Judge McMillian's concurring opinion sets forth the proper legal analysis of the issues pertaining to control over the settlement process. Agency judicially admitted that it endeavored to exercise control over the settlement process and that it owed a fiduciary duty.

Point II

The Determination Made By The Court That A Claim For Bad Faith Is Not Assignable In the State Of Missouri Is Contrary To Existing Law

The Opinion cited a number of cases which hold a claim for personal injuries is not assignable. (Opinion pp. 9-10) Without explanation, the Court concluded Wilhite's claim of bad faith was not assignable.

The Opinion of the Court overlooks the fact that Wilhite did not at any time endeavor to assign a claim for "personal injury". What he did assign were claims arising out of and relating to a "breach of contract" which he entered into with Agency. Kathleen Quick received an assignment from Wilhite for the right to assert a claim for remedies available by reason of the breach of a contractual relationship which Wilhite entered into with Agency, a claim which also sounded in tort.

The Opinion notes that ***Ganaway v. Shelter Mutual Ins. Co.***, 795 S.W.2d 554 (Mo.App. 1990) allows the assignment of bad faith claims ***either*** by the insured or by a bankruptcy trustee. (Opinion p 10). The Opinion effectively overlooks Missouri law allowing the assignment by an insured of a bad faith claim. If the Opinion were correct in its application of the law, any party in Wilhite's shoes would have to seek bankruptcy relief or be forced

into bankruptcy to obtain the benefit of assigning his bad faith claim to his judgment creditor.

Missouri Supreme Court decisions on the assignability of certain claims show that the only claims which are not assignable are those for personal injury, personal service, marriage contracts and the like. ***State ex rel Park National Bank v. Globe Indemnity Co.***, 61 S.W.2d 773 (Mo. 1993). Claims for fraud are assignable in Missouri. ***Houston v. Wilhite***, 27 S.W.2d 772 (Mo.App. 1930), including the right to assert a claim for punitive damages incident to the actual damages sustained by reason of the fraud. ***State ex rel. Smith v. Green,*** 494 S.W.2d 55 (Mo. 1973) and ***Eastern Atlantic Transportation v. Dingman,*** 727 S.W.2d 418 (Mo.App. 1987).

Point III

Jury Award of Actual Damages Reduced By The Court

The Opinion finds that Agency breached its contract to Wilhite by failing to defend him in the underlying suit for the wrongful death of Kathleen Quick's eleven year old daughter. (Opinion p. 5). The Opinion also notes that the jury awarded actual damages of $6.5 million. (Opinion p. 4). The jury verdict for actual damages was based upon a certified copy of a Judgment rendered against Wilhite in the underlying suit that Agency failed to defend.

The Opinion determines that $25,000 is the appropriate measure of damages, with the exception of Judge McMillian, who stated in his concurring Opinion:

> *" . . . I think a self insurer should be required to pay both liability claims and any claims related to its mishandling of those liability claims to the same extent as would a third party insurer." (Opinion p. 15).*

Missouri has, as most other jurisdictions, adopted the principles of contract damages as set out in the early English case of ***Hadley v. Baxendale,*** 9 Exch. 341, 26 Eng. L. & Eq 398 (1854). [See ***Liberty Financial Management v. Beneficial Data,*** *670 S.W.2d 40, 57 (Mo.App. 1984;* ***W. C. Hardesty Co., Inc. v. Schaefer,*** *139 S.W.2d 1031, 1035 (Mo.App. 1940)].*

Missouri Courts have clarified this long established rule by stating:

> *Under the contract claim the injured party can recover actual damages for the direct and natural consequences of the breach* ***or*** *for damages that were within the contemplation of the contracting parties." (emphasis added).* ***Ross v. Holton,*** *640 S.W.2d 166, 173 (Mo.App. 1982).*

Until now, this Court has been in accord with these principles as shown in ***United Industrial Syndicate, Inc. v. Western Auto Supply Company,*** 686 F.2d 1312 (8th Cir. 1982), where the court stated:

> *The fundamental measure of contract damages is that which places the non-breaching party in the position it would have been but for the breach.*

See also ***Boten v. Brecklein,*** 452 S.W.2d 86 (Mo.App. 1990).

Missouri Courts have not hesitated to apply this measure of damages in cases where an insurer has failed

to defend the insured. In ***Landie v. Century Indemnity Company,*** 390 S.W.2d 558, 562 (Mo.App. 1965) the Court states:

> *Thus the universal rule which Missouri follows is that an insurance company is liable to the limits of its policy plus attorney fees, expenses* ***and other damages*** *where it refuses to defend an insured who is in fact covered. (Emphasis added).*

The Court in ***Landie*** *further stated:*

> *This general rule is concisely set out in the annotation at 49 ALR2d 694, 1.c.711 where it is said: 'Thus, all the cases agree that where it is the insuror's duty to defend, and the insuror wrongfully refuses to do so on the ground that the claim upon which the action against the insured is based is not within the coverage of the policy, the insuror is guilty of a breach of contract which renders it liable to the insured for all damages resulting to him as a result of such breach'.*

The Eighth Circuit has interpreted and applied ***Landie*** in ***Luke v. American Family Mutual Insurance Company,*** 476 F.2d 1015, 1021 (1973). In ***Luke,*** the Court sitting en banc, held that an insuror who both refused to settle a claim for policy limits in a wrongful death case and refused to defend its insured, was responsible for all the damages resulting and specifically stated, at page 1022, the following:

> *We find the entire judgment was the natural consequence and proximate result of the defendant's breach of its obligation to defend its assured.*

In ***Fuller v. Lloyd,*** 714 S.W.2d 698 (Mo.App. 1986), suit was brought by the insured against USF&G for the

failure to defend an underlying suit. Judgment was entered against USF&G for $10,000.00 which represented consequential damages for the loss of the insured's driver's license, along with a judgment for indemnification from an underlying judgment in the amount of $25,000 previously obtained against Lloyd, the insured of USF&G. The Court specifically noted in assessing consequential damages that:

> *When an insurance company refuses to defend an insured, the company becomes liable for damages which flow from the refusal to defend. (At page 702).*

Judge McMillian recognized this basic rule of consequential damages in ***Carpenter v. Automobile Club Interinsurance Exchange***, 58 F.3d 1296 (8th Cir. 1995) where he stated at page 1302 that the insured:

> *. . . cannot be made whole unless she is given the opportunity to recover the entire amount of the judgments obtained against her in the underlying state court action . . .*

In light of the testimony of Agency's adjuster, its Vice President and head of claims, (p. 2 of this petition) and its in-house attorney, it is clear that the underlying judgment against Wilhite was the direct consequence of Agency's failure to defend him.

Testimony of Ockajik. (Tr. p. 220, L. 15-22):

Q. Isn't it true, Mr. Ockajik, that Agency Rent-A-Car did not protect Mr. Wilhite?

A. Yes.

Q. And isn't it true, Mr. Ockajik, that if Agency Rent-A-Car would have just hired a lawyer for Mr. Wilhite, there wouldn't be a six and a half million dollar judgment against him that he couldn't possibly pay today?

A. Yes.

The testimony of in-house counsel, Yormick. (Tr. pp. 265, L. 25 and 266, L. 1-10.)

Q. Mr. Yormick, isn't it true that Agency Rent-A-Car owed him protection? They owed him liability protection and a defense and a duty to consider settlement offers or demands within the limits of coverage available; isn't that true, sir?

A. Yes, I think that's been established, and I would agree with that.

Q. And isn't it true that by reason of the lack of a defense being provided on his part, he has a judgment against him for six and a half million dollars today?

A. That's true.

The Opinion of the Court leaves Wilhite exposed to a debt in excess of $7 million and is contrary to the law of consequential damages. The Opinion conflicts with this Court's prior determinations which hold that evidence supporting an issue, determined by a jury, must be considered in a light most favorable to the non-movant. All conflicts in the evidence must be resolved in favor of the non-movant and the Court is required to assume as proved all facts that the non-movant's evidence tended to prove, giving the benefit of all reasonable inferences that

may reasonably be drawn from the facts proved. ***Nelson v. Boatmen's Bancshares, Inc.,*** 26 F.3d 796 (8th Cir. 1994).

In this case, the evidence presented to the jury substantiated that Agency was forewarned a judgment for the exact amount rendered against Wilhite was possible. The possibility of the judgment amount was shown by the testimony relative to the oral communications had with agency in July 1992 (Tr. p. 44-45) and again on March 30, 1993 (Tr. pp. 55-57) then in writing on April 5, 1993. (Tr. pp. 60-62 and Plaintiff's trial Ex. 5, K. Quick, App. p. A37A40.) Agency was clearly warned that the claim against Wilhite might be worth $6.5 million.

As indicated by the Court in its footnote at page 2 of its Opinion, the evidence presented at trial substantiated that Agency was given an opportunity, prior to the time the default judgment was entered, to obtain a release of liability for Wilhite in exchange for its agreement to pay the sum of $25,000. Aside from the testimony, these facts were born out by documentary evidence in the form of written communications submitted to Agency under dates of March 12, 1993 and April 5, 1993 (Tr. pp. 52-53, 104; Plaintiff's trial Ex. 3, K. Quick App. p. A27-A28 and Tr. pp. 60-62, Plaintiff's trial Ex. 5, K. Quick App. p. A37-A40). The judgment for $6.5 million was rendered against Wilhite on April 27, 1993. Agency had been warned three times (twice orally and once in writing) that the extent of Wilhite's exposure might well be in the amount of $6.5 million. No claim can now be made that Agency was not apprised of the potential damage to Wilhite in the event of its non-performance. It is the damage due to Agency's non-performance which Wilhite was entitled to recover as

actual damages and which in fact the jury assessed by its verdict after hearing all of the evidence in the case.

By reducing the actual damages to $25,000 from the verdict of $6.5 million, the Opinion collides with the prohibitions imposed by the Seventh Amendment to the United States Constitution and this Court's holdings in ***Kelley v. Crunk***, 713 F.2d 426 (8th Cir. 1983); ***Green v. American Airlines, Inc.***, 804 F.2d 453 (8th Cir. 1986); ***Czajka v. Black***, 901 F.2d 1484 (8th Cir. 1990); and ***Latham Seed v. Nickerson American Plant Breeders***, 978 F.2d 1493 (8th Cir. 1992).

The Opinion determines that Wilhite, and Kathleen Quick as the assignee of Wilhite's claims against Agency, must be treated differently from all others who sustain damages from a breach of contract, thus denying them equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution.

The effects of the Opinion serve to limit the exposure of any liability insurance carrier to the policy limits for a breach of duty to defend its insured. The chilling effects of this ruling provide no incentive for an insurer to provide a defense of a claim which has a value which is obviously in excess of the policy limits.

Required Statement Of Counsel

In compliance with Rule 35A of the United States Court of Appeals for the Eighth Circuit, counsel for Kathleen Quick states: I express a belief, based on a reasoned and studied professional judgment, that the decision is contrary to the Seventh Amendment to the

United States Constitution and the following decisions of the United States Court of Appeals for the Eighth Circuit, and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court:

> Seventh Amendment to the United States Constitution; ***Kelley v. Crunk,*** 713 F.2d 426 (8th Cir. 1983); ***Green v. American Airlines, Inc.,*** 804 F.2d 453 (8th Cir. 1986); ***Czajka v. Black,*** 901 F.2d 1484 (8th Cir. 1990); ***Latham Seed v. Nickerson American Plant Breeders,*** 978 F.2d 1493 (8th Cir. 1992); ***United Industrial Syndicate, Inc. v. Western Auto Supply Co.,*** 686 F.2d 1312 (8th Cir. 1982). ***Luke v. American Family Mutual Insurance Company,*** 476 F.2d 1015 (8th Cir. 1973); ***Carpenter v. Automobile Club Interinsurance Exchange,*** 58 F.3d 1296 (8th Cir. 1995).

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on September 25, 1995, twenty-one copies of the foregoing PETITION AND SUGGESTION FOR REHEARING EN BANC were served upon the

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VIA:

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/s/ Thomas W. Millington
Thomas W. Millington